Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT SCOTT FISHER,
Petitioner

v.

SUPREME COURT OF COLORADO,
Respondent.

On Petition for Writ of Certiorari
To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

Robert S. Fisher
Law Firm of Robert S. Fisher, P.C.
924 N. Wahsatch Ave.
Colorado Springs, CO 80903
(719) 633-1016

Questions Presented for Review

1. Was the Petitioner denied due process of law in Colorado by being denied the right to receive exculpatory evidence in an attorney disciplinary proceeding?

2. Was the Petitioner denied due process of law in Colorado by being disciplined for securing his fees with a deed of trust when the conduct was not known to be prohibited by members of the bar, at the time the fees were secured, and men of common intelligence were forced to guess as to the meaning of the Rules of Professional Conduct and differ as to their application?

List of Parties

Petitioner:
ROBERT S. FISHER
924 N. Wahsatch Ave.
Colorado Springs, CO 80903
(719) 633-1016
(719) 633-1005 (fax)

Respondent:
COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203
(303) 837-3790

Attorney Regulation Counsel:
CHARLES E. MORTIMER, Jr.
Assistant Regulation Counsel
1560 Broadway, Suite 1800
Denver, CO 80202
(303) 866-6400, ext. 6443
(303) 893-5302 (fax)

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I. Basis for Jurisdiction

On February 9, 2009, the Colorado Supreme Court entered judgment against the Petitioner for the commission of several violations of the Colorado Rules of Professional Conduct. In re Fisher, 202 P.3d 1186 (Colo. 2009). The Petition for Rehearing was denied on March 2, 2009. This court has jurisdiction pursuant to 28 U.S.C. §1257 because the final judgment of the Colorado Supreme Court may be reviewed by the United States Supreme Court by way of writ of certiorari where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution of the United States.

II. Constitutional Provisions Relied on for this Petition

The constitutional provisions relied on for this appeal are the U.S. Constitution, amend. V, which provides, in part: "No person shall... be deprived of life, liberty, or property without due

process of law...", and U.S. Const. amend. XIV, §1 which provides, in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law..."

II. Preliminary Remarks

Reference is made in the statement of the case to the official record, in case it is necessary to review the record for purposes of this Petition, to confirm the accuracy of the information contained herein. The three volumes of pleadings remain with the Presiding Disciplinary Judge, and shall be referred to as "P1", "P2", and "P3", shall be placed in parenthetical, and shall include the page number for easy reference. The reporter's transcripts (Volumes XVI, XVII, and XVIII) shall be referred to as T1, T2, and/or T3, for volume 1, 2 and/or 3, and shall include the page and line number of the transcript for easy reference. Mrs. Varner shall be

referred to as "Wife", and Mr. Varner shall be referred to as "Husband".

IV. Statement of the Case

a. Procedural History

On April 23, 2007, the Colorado Presiding Disciplinary Judge (hereinafter PDJ) entered summary judgment against the Petitioner on Count 1 of the People's Complaint, for violating Colo. RPC 1.8(a) (a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to the client unless the terms are fair and the client consents in writing, the client is informed that independent counsel may be advisable and the client is given an opportunity to seek such advise), and Count 2, Colo. RPC 1.8(j) (a lawyer shall not acquire a proprietary interest in the subject matter of the litigation, except that the lawyer may acquire a lien granted by law to secure

fees). (P2, page 427 through 439). The PDJ reasoned that Colo. R.P.C. 1.8(a) applies because the taking of a deed of trust is a "business transaction" and/or is equivalent to acquiring a security or other pecuniary interest that is adverse to a client. The PDJ also found that the deed of trust was a proprietary interest in the litigation, which was not excepted from Colo. R.P.C. 1.8(j) because it was not a lien *granted by law*.

On October 30, 2007, the Petitioner was found to have violated Colo. R.P.C. 1.3 (a lawyer shall not neglect a legal matter entrusted to him), and Colo. R.P.C. 1.1 (a lawyer shall provide competent representation to a client). As a result, the Petitioner received a six months suspension, all stayed, and two years of probation. In re Fisher, 203 P.3d 1192 (Colo. 2007).

The above orders were affirmed by the Colorado Supreme Court on February 9, 2009. In re

Fisher, 202 P.3d 1186 (Colo. 2009). The Petition for Rehearing was denied March 2, 2009.

b. Issues in the Divorce

On June 12, 2003, the Petitioner was retained to represent Shirley Varner, hereinafter also known as "Wife" in a dissolution of marriage action. (Exhibit 1). The contract allowed the attorney to charge interest at 18% per annum on any unpaid balance over 30 days past due. (Exhibit 1). Division of the parties' retirement benefits, and survivor benefit protection to safeguard Wife's interest in Husband's pension benefits, were among the issues to be determined at the hearing on final orders. (Exhibit 2, page 4, and exhibit C, page 9, lines 2 through 19, and page 15, lines 13 to 15).

c. Deed of Trust

On November 7, 2003, Wife signed a promissory note for fees earned up to that point in time, which was secured by a deed of trust on the

marital home. (Exhibit 3, page 1 and 2). The deed of trust did not require a minimum monthly payment, had no forfeiture clause, and provided for interest at the rate of 8% per annum. (Exhibit 3, page 2).

The Petitioner testified that he attended a Continuing Legal Education seminar that was sponsored by the Colorado Bar Association *prior* to executing the above deed of trust, where he asked if there was anything wrong with obtaining a consensual deed of trust to secure legal fees, and was told that there was no case law or authority in Colorado which precludes the above transaction. (T3, page 751, lines 15 to page 752, line 4). The Petitioner reviewed Colo. R.P.C. 1.8(j) immediately after the above seminar, and interpreted the language in Rule 1.8(j) where it says "*granted by law* to secure legal fees", as meaning the same as "authorized by law", and a consensual deed of trust is authorized by law. Thus, the Petitioner

concluded that it was permissible to secure payment of legal fees with a consensual deed of trust. (T3, page 780, line 22, through page 783, line 19). The People admit that Wife did not sustain any financial harm due to the deed of trust. (Exhibit Q, admission 20).

Three judges testified that it is not uncommon for attorneys in the Petitioner's community to secure payment of their legal fees in a pending divorce, with a note and deed of trust on the marital home, to include retired District Court Judge Douglas Anderson, District Court Judge Robert Lowrey (Vol. XII), and Magistrate Robert Erler (T2, page 555, line 18, through page 556, line 20). Retired District Court Judge Anderson testified that he has done more divorce cases than any trial judge in Colorado (T1, page 226, lines 16 through 23), and that it is not uncommon for attorneys to take a deed of trust to secure their fees. (T1, page 227, line 21, through page 228, line 21).

Judge Anderson explained that attorney fees always reduce the size of the marital estate, but he believes it is good practice to permit attorneys in a divorce to be able to secure their fees with a deed of trust because it helps to secure legal representation. (T1, page 232, lines 13 through 21). Judge Anderson opined that the Petitioner has a good reputation for truth and veracity (T1, page 247, lines 9 through 11).

d. Neglect of Legal Matter & Incompetence

At Wife's hearing on final orders, Husband testified that he already signed up for a survivor annuity benefit so Wife would continue to receive approximately $2,100.00 per month for the rest of her life if he predeceased her. (Exhibit W, page 9, lines 8 through 19, page 25, line 25 to page 26, line 7, and page 37). Husband also introduced an exhibit into evidence to prove that he signed up for the survivor annuity, and testified that he could not cancel the coverage if ordered to keep it. (Exhibit

W, page 37, line 10, through page 38, line 20). Husband was in good health and able to work at the time of the hearing on final orders. (T1, page 110, line 23, to page 111, line 4, page 156, lines 12 to 13, and page 161, line 24 to page 162, line 1).

During closing argument, the Respondent requested an order which equally divided Husband's pension and an order which required Husband to maintain survivor benefits for Wife's protection (exhibit C, page 8 lines 19 through 21; page 15, lines 13 to 18).

At the conclusion of the hearing, the court entered an order which allowed Wife to receive one-half of Husband's pension, and which required Husband to provide Survivor Benefit Plan (SBP) protection/insurance so Wife can continue to receive a share of Husband's future retirement benefits if Husband predeceases Wife. (Exhibit F, pages 1 and 3, and P2, page 610).

The court also ordered *Husband* to prepare

the written order for survivor benefits. (T1, page 158, line 13 to page 159, line 11, and page 186, lines 23 to 25). However, Husband's attorney never prepared the required order. (T1, page 159, lines 12 to 17) Instead, the Petitioner prepared the Decree of Dissolution of Marriage and Final Orders, which also included the order for survivor benefits (T1, page 162, lines 22 to 25), and this was done on January 20, 2004. (T1, page 164, lines 2 through 14, Exhibit 7).

In response to the claim that the Petitioner did not know how to secure the survivor benefits, *which were already secured*, the Petitioner explained that he intended to gain the knowledge, *which the Rules permit*, but was prevented from doing so after Wife withdrew the authorization to continue work on her behalf. (T3, page 766, line 3, to page 767, line 2).

Wife timely received her share of Husband's retirement benefits, directly from Husband,

between the date of the hearing on final orders through the Petitioner's representation of Wife (T1, page 111, line 14, to page 112, line 14; and page 160, line 7 to page 161, line 8), and continuing thereafter until Husband's death (T1, page 116, lines 2 through 11). The Petitioner knew Wife was receiving her share of Husband's pension benefits on time because he checked with Wife on at least two occasions, post decree. (T1, page 160, line 23 to page 161, line 9; T2, page 457, lines 14 through 17).

The Hearing Board found that Wife's physical and mental condition made it difficult for the Petitioner to complete her objectives following final orders, and that Wife was a difficult client with whom to communicate (P3, page 658 and 661). The People's expert agreed. (T1, page 174, line 21, to page 175, line 11, and page 216, lines 17 to to page 217, line 6).

On or very shortly after March 29, 2004, Wife left a message with the Petitioner to "stop all

work", on her behalf. (Exhibit Q, page 1; and P2, page 609 of the Stipulations of Fact). The People admit that the Petitioner would have violated Colo. R.P.C. 1.2 if he continued to work on Wife's behalf after he received the message to stop all work. (Exhibit Q, admission 8). The Petitioner interpreted this message to stop all *new* work, and called Wife many times to confirm whether he accurately interpreted her message. (T2, page 452, lines 7 through 18, and page 453, lines 14 to page 454, line 12; and T3, page 766, line 18, through page 767, line 2). The People admit that after March 29, 2004, Wife received at least two letters and several telephone messages from the Petitioner and/or his secretary which requested Wife to contact the Petitioner's office. (Exhibit Q, admission 2 and 4). However, Wife never returned the Petitioner's multiple telephone messages. (T2, page 450, lines 2 through 4; and T3, page 766, line 18 through page 767, line 2). On April 28, 2004, the Petitioner wrote

Wife a letter and requested Wife to schedule an appointment, indicated that Wife's telephone number was disconnected, and requested Wife to provide a current telephone number. (Exhibit N, page 1). Wife did not respond to this letter. (T1, page 300, lines 17 through 20, and page 301, lines 5 through 20). On May 6, 2004, the Petitioner filed a Notice of Claim of Attorney's Lien, wherein he asserted a lien on any money which may be due Wife from the sale of the marital home. (Exhibit 17). On May 25, 2004, the parties closed on the sale of the marital home. (Exhibit 18; T3, page 808, lines 4 through 7). On May 28, 2004, the Petitioner sent another letter that he would withdraw as Wife's attorney on June 2, 2004, if she did not schedule an appointment. The Petitioner explained that he hoped his withdrawal was not necessary, but that there was no point to remaining as Wife's attorney if she was unwilling or unable to meet with him, because the Petitioner could not help Wife

without her input, cooperation (Exhibit N, page 2), and authorization. (T3, page 805, line 22, to page 806, line 4). When the letter of May 28, 2004 was sent, there was no other task left that needed to be done other than contacting the Office of Personnel Management, hereinafter "OPM", to confirm whether Wife's pension/survivor benefits were secured. (T3, page 805, line 4 to page 808, line 7). The Petitioner did not specifically identify the last task that he thought was necessary in the above two letters, namely to contact OPM to confirm whether Wife's survivor benefits were secure, because he already left *many* telephone messages with Wife regarding this issue. (T2, page 464, line 25 to page 465 line 6; page 511, line 12 through page 513, line 21). No evidence was offered to refute this claim even though Wife was still available to testify in rebuttal. (P3, page 837).

Wife knew the consequences associated with not securing her survivor benefits through OPM

because she was a former civil service employee who had a retirement or disability package, which included survivor benefits. (T2, page 511, line 22 through page 512, line 8). In fact, Wife educated the Petitioner about the consequences of not securing benefits with OPM, at the beginning of the Petitioner's involvement. (T2, page 511, line 22, through page 512, line 5). Wife was also present in court when this issue was litigated. (Exhibit C, page 15, lines 13 to 17).

The Petitioner withdrew as Wife's attorney on June 4, 2004. (P2, page 609). The People admit that the Petitioner's fees were reasonable. (Exhibit Q, admission 17).

On April 22, 2005, Husband died. His death, about 1.5 years after the hearing, came as a surprise to everyone because nobody knew he had a heart condition. (T1, page 111, lines 5 through 12). Thereafter, Wife's benefits were temporarily suspended because OPM, which is the agency that

managed the retirement plan, erroneously concluded that the "divorce decree was not a qualifying court order and did not provide court ordered survivor benefits." (T1, page 212 line 3 to page 213, line 4; Exhibit Y, pages 5, 6, and 26). Later, OPM memorialized that their decision to suspend benefits was a mistake and that the decree that the Petitioner prepared was a qualifying order. In its Reconsideration and Appeals Division Findings, OPM wrote: "Finding: After reviewing the file, we rescinded our reconsideration decision finding that Shirley R. Varner was not entitled to survivor benefits *based on the court order.* Court Order Section has affirmed that she is entitled to a survivor annuity benefit." (Exhibit Y, page 5 and especially page 6). Thereafter, OPM retroactively reinstated Wife's benefits. (P2, page 610; Exhibit Q, admission 6; Exhibit Y, pages 5 and 6; and T1, page 163, lines 1 through 6).

e. Procedural Irregularities

Prior to the Petitioner's trial, the Petitioner filed a motion to compel the People to respond to his discovery requests, which included a request for all exculpatory information. (See the Petitioner's Third Motion to Compel, dated June 1, 2007) (P2, page 500-513, #19). However, the court denied the motion in its entirety because it concluded, in part, that "the information is of little or no value to the fact-finding process in this case." (P2, page 541).

The Petitioner also tendered a single interrogatory prior to trial to gather exculpatory or mitigating information regarding why the charge of violating Colo. R.P.C. 1.8(a) was dismissed against another attorney, on the People's motion, for identical conduct, in a published decision in People v. Gifford, 76 P.3d 519 (Colo. 2003). However, the People objected to responding to the above interrogatory, and the Petitioner was unable to

compel a response even though he filed a motion to compel.

After the trial, the Petitioner learned that the People retained the services of a law firm to review the report of the Petitioner's expert. The Petitioner then filed a motion for a new trial based on this newly discovered evidence, and for an order to compel the People to provide the Petitioner with all correspondence to and from its expert, and with a summary of all findings made by its expert if their opinions were not already reduced to writing. (T3, page 852-856). In the above motion, the Petitioner claimed that he was denied due process of law, pursuant to the U.S. Const., amend V and XIV, by being denied the right to receive all exculpatory information, to include information regarding the opinions of the People's unendorsed expert. The Petitioner also cited Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10

L.Ed.2d 215 (1963) (due process claus of the U.S. CONST. amend. V) and United States v. Bagley, 473, U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985 (made applicable to the states through U.S. CONST. amend. XIV, §1), as authority for the right to receive all exculpatory information. All of the Petitioner's post-trial motions were denied. (P3, page 863-865).

The Petitioner appealed the decision which denied him the right to review exculpatory information in the possession of the People. However, the Colorado Supreme Court ruled that the Petitioner was not allowed exculpatory information in a disciplinary proceeding because the full panoply of criminal protections do not apply and the Rules of Criminal Procedure do not govern disciplinary proceedings. This important question of federal law has not been, but should be, settled by this Court.

f. Expert Witness

The People called, and the court accepted, Thomas Henley, to testify as an expert (T1, page 123, lines 9 through 14) concerning the division and transfer of retirement benefits upon the dissolution of marriage, family law, and ethical matters. (T1, page 128, lines 13 to 20; page 148, lines 18 to 20).

g. Standard of Care

Mr. Henley testified that the standard range of time for family law attorneys to prepare an order dividing pension/survivor benefits and submitting it to OPM, is between 30 days and 9 months after the decree is entered (T1, page 152, line 3 to page 154, line 1, page 198, lines 13 to 20), while OPM requires that it must be secured within two years. (T1, page 139, lines 7 through 21). The period of time within that range would be later if the obligee (Wife) is already receiving her retirement benefits on time (T1, page 154, lines 21 to page 155, line 2; and page

160, line 7 page page 161, line 9), and because the benefit may be tax free to the recipient (Wife) (T1, page 155, lines 9 to 25), and sooner, if the obligor (Husband) was in poor health (T1, page 156, lines 3 to 10).

Mr. Henley explained that the opportunity for the Petitioner to discharge his duty of advise and oversight was hindered by Wife's conduct (T1, page 173, line 22, to page 175, line 11, and page 217, lines 7 to 12), thus, delaying the opportunity to confirm whether the benefits were secure, until a later date. (T1, page 216, line 17 to page 217, line 18).

Still, Mr. Henley explained that the Petitioner protected Wife's interest 100% by writing the language he wrote into the decree, *on the same date the decree was signed* (T1, page 203, lines 5 to 13), that Wife would not have survivor benefits today but for the decree (T1, page 169, lines 8 to 10), that the decree was the only order that could

have secured Wife's retirement/survivor benefits (T1, page 165, lines 8 to 25, page 192, lines 6 to 10), and that the decree met all of the requirements of the Code of Federal Regulations. (T1, page 164, lines 15 through 19). No evidence was offered to rebut Mr. Henley's opinions.

According to Mr. Henley, the administrative person at OPM who originally rejected the order for survivor benefits, was mistaken, and OPM corrected this internal mistake when they reinstated benefits. (T1, page 163, line 1, to page 165, line 19; page 212, lines 3 to page 214, line 3; and exhibit Y, page 6 of 36).

In spite of the foregoing, the People suggested that the Petitioner neglected a legal matter by not mailing the decree to OPM in a timely manner. (T1, page 145, line 18 to page 146, line 11). However, Wife testified 12 times that she mailed a copy of the decree to OPM (T1, page 320, line 18 to page 326, line 25), and that she did so *within one week*

after the decree was signed. (T1, page 324, lines 10 to 17). Further, Wife sent the decree to OPM at the direction of the Petitioner. (T1, page 167, lines 23 to 25, and page 324, lines 6 to 17, page 328, lines 2 to 9).

The trial was concluded on July 26, 2007 (P3, page 647), and final arguments were submitted on August 17, 2007. (T3, page 817, lines 12 through 16).

On October 30, 2007, the Hearing Board found that "insufficient evidence exists to find that the reason OPM ultimately recognized Wife's claim to survival benefits in Husband's pension plan was based upon the final orders that were prepared by the Petitioner." (P.3, page 655). The court then concluded that the Petitioner violated Colo. R.P.C. 1.3 by neglecting a legal matter. (P3, page 655). The court explained that "while the Petitioner won a judgment from the trial court awarding Wife these benefits, he did not take the next step to

secure them. Thus, he did not accomplish one of his client's primary objectives for the representation." (P3, pages 655 to 656). The court also found that the Petitioner violated Colo. R.P.C. 1.1, by not providing competent representation to Wife. (P3, page 656). The court reasoned:

> ... Petitioner should have researched the necessary process to secure his client's benefits... If Petitioner had taken these reasonable steps, he could have, at a minimum, been able to advise his client of the potential injury she might suffer if he was not allowed to continue working on her case to secure her benefits. (P3, page 656).

Of interest, The People admit in their response brief and again at oral argument before the Colorado Supreme Court that they do not know why Wife has survivor benefits today.

V. ARGUMENT

1. The Petitioner was denied due process of law in Colorado by being denied the right to receive exculpatory evidence in an attorney disciplinary proceeding.

The U.S. Supreme Court has already ruled that "these (disciplinary cases) are adversary proceedings of a quasi-criminal nature." In re Ruffalo, 390 U.S 544, 551 (1968). Thus, the due process protection which requires the State to produce all exculpatory information prior to trial that is afforded to the criminally accused, must be applied to Petitioner-attorneys in disciplinary cases. *See* Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963) (due process clause of fifth amendment), and made applicable to the states through the fourteenth amendment in United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

In Brady, the U.S. Supreme Court held that "suppression by the prosecution of evidence

favorable to an accused upon request violates due process where the evidence is material either to guilt *or to punishment*, irrespective of the good faith or bad faith of the prosecution." See also In the Matter of Attorney C, 47 P.3d 1167, 1170 (Colo. 2002). The specific test for materiality is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433 (1995) (quoting Bagley, 473 U.S. at 682); In the Matter of Attorney C, 47 P.3d at 1170. It is reasonable to conclude that the People's expert agreed with Mr. Henley's findings, because if he did not he would have been called to testify in rebuttal because all of Mr. Henley's opinions favored the Petitioner's defense. The opinions of the People's expert go directly to whether the Petitioner protected Wife's pension and survivor benefits, and it likely would have provided

the court with sufficient information (even though the Hearing Board already had sufficient evidence) to credit the Petitioner with preparing a decree which was acceptable to OPM. If it was important enough for the Hearing Board to comment that "insufficient evidence exists that OPM recognized Wife's claim to survivor benefits due to the decree prepared by the Petitioner", then it is reasonable to conclude that the result may have been different if the evidence was sufficient.

Although the Colorado Supreme Court recognized that attorney discipline proceedings are quasi-criminal in nature, it concluded that this does not mean that the full panoply of criminal protections apply, or that the Rules of Criminal Procedure should govern disciplinary proceedings. In the Matter of Fisher, 202 P.3d 1186, 1199 (Colo. 2009). As a result, the Petitioner was denied the right to find out whether the People's expert had exculpatory information that may have been

material to the Petitioner's guilt or to punishment. However, the holding in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), which compels the People to produce exculpatory information in criminal prosecutions, must be extended to disciplinary matters because the reasons for doing so are analogous.

> Consider A.B.A., Code of Professional Responsibility EC 7-13 (1978): "The responsibility of a public prosecutor differs from that of a usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all, and (3) in our system of criminal justice the accused is to be given the benefit ..."

Like the prosecutor in a criminal case, the attorney

regulation counsel represents the sovereign State of Colorado, and therefore should use restraint in the discretionary exercise of governmental powers; the decisions made by the regulation counsel should be fair to all, and in our regulation system the accused is afforded the benefit by requiring the prosecution to prove their case with a heightened burden of proof - namely, clear and convincing, versus the preponderance standard used in general civil litigation. Similarly, "a prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." See comment one to Colo. R.P.C. 3.8. The responsibility of the regulation counsel in a disciplinary case should be no less. "A prosecution that withholds evidence which would tend to exculpate the accused, or reduce the penalty, helps

shape a trial that bears heavily on the accused. That casts the prosecutor in the role of an architect of a proceedings that does not comport with standards of justice." Brady v. Maryland, 373 U.S. 83.

As a result, Colorado Rule of Civil Procedure 251.18, which provides that disciplinary proceedings shall be conducted pursuant to the Colorado Rules of Civil Procedure, and C.R.C.P. 26(b)(4)(B) which shields the People from being compelled to provide exculpatory information in disciplinary matters, must yield to the Petitioner's right to due process of law as guaranteed by the U.S. CONST. amend. V, and made applicable to the states through the U.S. CONST. amend XIV §1. The decision of the Colorado Supreme Court must be reversed because the Petitioner was denied due process of law. The People must be compelled to disclose whether their expert agreed with *any* of Mr. Henley's opinions, and the Petitioner should be

permitted access to the People's expert to confirm whether he has exculpatory information.[1] Similarly, the People must be compelled to respond to the Petitioner's interrogatory regarding why an identical charge against another attorney was dismissed in the case of People v. Gifford, 76 P.3d 519 (Colo. 2003), for similar/identical conduct because this response may go to the issue of the Petitioner's guilt or punishment.

2. The Petitioner was denied due process of law in Colorado by being disciplined for securing his fees with a deed of trust because Colo. R.P.C. 1.8(a) and 1.8(j) were unduly vague at the time they were first interpreted and applied to the Petitioner, and members of the bar were forced to guess as to their meaning.

The decision to impose discipline for

[1] Respectfully, the Petitioner does not trust the People to determine for the Petitioner whether its expert has exculpatory information because the People have previously claimed that Mr. Henley's opinions favor the People and the Petitioner is unable to reconcile this claim with the evidence.

violations of Colo. R.P.C. 1.8 (a) and (j) must be reversed because the above rules were unduly vague prior to being defined in reasonably clear terms for the first time, in this case. As a result the Petitioner was denied due process of law.

> A regulation that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v. General Constr. Co., 269 US 385, 391, 70 L.Ed. 322, 46 S. Ct. 126 (1926). The Fourteenth Amendment's Due Process Clause "insists that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108-109, 33 L.Ed. 2d 222, 92 S.Ct. 2294 (1972).

These guarantees apply fully to attorney disciplinary proceedings. In re Ruffalo, 390 U.S. 544, 550 (1968).

> ..where "the appraisal of an attorney's conduct is none about which

> reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question", and where the State has not otherwise proscribed the conduct in reasonably clear terms, the Due Process Clause forbids punishment of the attorney for that conduct. In re Ruffalo, 390 US 544, 455-556, 20 L. Ed 2d 117, 88S. Ct 1222 (White, J., concurring in result).
>
> Zauderer v. Office of Disciplinary Counsel, 471 US 626, 665-666, 85 L.Ed. 2d 652, 681-682,105 S. Ct. 2265 (1985) (Brennan and Marshall, JJ. concurring).

i. The caselaw in Colorado was unclear and/or suggested that an attorney may secure their fees with a deed of trust, at the time Wife executed the deed of trust, without being in violation of Colo. R.P.C 1.8(a) or 1.8(j).

The Colorado Supreme Court *never* interpreted Colo. R.P.C 1.8(a) or 1.8(j) to prohibit the above conduct until the Petitioner's appeal. As a result, the Petitioner was denied a reasonable opportunity to know what was prohibited so that he

could act accordingly, especially when the Colorado Supreme Court rendered earlier decisions which suggested that the practice was permitted. For example, in People v. Gifford, 76 P.3d 519 (Colo. 2003), the attorney was charged with violating Colo. R.P.C 1.8(a) by taking a deed of trust in a divorce to secure her fees without referring the client to an independent attorney, but the charge was inexplicably dismissed in a published opinion[2], thus conveying the message that a deed of trust was not the kind of business transaction that was contemplated by Colo. R.P.C. 1.8(a).

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[2] Attached as an exhibit to the Gifford opinion was the complaint that was filed against the attorney, which included count number 15 for allegedly violating Colo. R.P.C. 1.8(a) by securing her fees with a deed of trust. Of interest, footnote 3 of the complaint also referenced Colorado Ethics Opinion 110 (which requires an attorney to refer the client to an independent lawyer before executing a deed of trust to secure attorney fees), but the Opinion was not followed.

Similarly, People v. Franco, 698 P.2d 230 (Colo. 1985), suggested that attorney's in Colorado can secure their fees with a deed of trust without being deemed to have acquired a proprietary interest in the cause of action or subject matter of litigation in violation of Colo. R.P.C. 1.8(j). In Franco, the attorney obtained a promissory note and deed on the marital home to secure his fees, and at the time believed that his client's share of the equity would exceed the amount of the note. At the closing, the attorney then collected the full amount due, pursuant to his deed of trust, and deposited the money into his personal operating account, even though he had notice at the closing that the money he received and spent included funds which belonged to the spouse of his client, and was the subject of a motion that was scheduled for a hearing three days after the closing. The attorney proceeded to treat the funds as though they were his

own and only made the proper reimbursement after a grievance was filed and a contempt citation was issued. Although the attorney in Franco was disciplined, it was *not* for taking a note and deed of trust to secure his fees. Rather, it was for refusing to return the money after he had notice that it was not his to keep. In Franco, this Court stated: *"as we review the record, the Petitioner's actions (in taking the deed of trust) were in good faith until the day that the sale was closed on his client's property."* (emphasis added). Thus, Franco seems to endorse the proposition that an attorney in a divorce case may take a note and deed of trust to secure their fees without violating Colo. R.P.C. 1.8(j), so long as the attorney does not collect an amount greater than his client's interest.

In spite of the foregoing authority, the Petitioner affirmatively sought an answer to whether Colorado attorneys can secure their fees

with a deed of trust before he used this method to secure his fees, by attending a seminar in Colorado, where he was advised that there was no caselaw in Colorado which addressed this issue. As a result, it is helpful to view how other states have ruled on this issue to determine whether the Petitioner had a reasonable opportunity to know what was prohibited, so that he could act accordingly.

ii. The majority of the states have ruled that taking a note and deed of trust to secure a fee is not a business transaction with a client that is prohibited by Rule 1.8(a).

The *majority* of the states that have ruled on this issue have held that taking a note and deed of trust to secure a fee is *not* a business transaction with a client, and therefore not prohibited by Rule 1.8 (a). These states include: Arizona, Connecticut, Iowa, Idaho, Oregon, and Wyoming. *See e.g.*, Iowa State Bar v. McCullough, 465 N.W.2d 878 (Iowa 1991) (mortgage and confession of judgment

executed by client to provide security for present and future fees are *not* "business transactions" within meaning of disciplinary rule prohibiting entry of business transaction with client); In re May, 538 P.2d 787, 790, n. 2 (Idaho 1975) (where the Idaho Supreme Court recognized that an attorney can take a security interest for fees in real estate without running afoul of the business transaction rule.[3] Schroeder v. Case, 43 P.3d 445 (Or. App. 2002) (held that a fee arrangement between farmers who gave promissory notes secured by a mortgage to their attorneys was not a "business transaction" that required attorneys to make full disclosure and get farmers' consent, in order to comply with disciplinary rule governing business transactions, even though the attorneys

[3] However, in that case the attorney was disciplined because the hearing board found that he did not take the home as security for his fees, rather, he took the home so he could live in it.

ultimately foreclosed on the mortgage); Iowa State Bar v. McCullough, 468 N.W.2d 458 (Iowa 1991) (held that a mortgage and confession of judgment executed by client to provide security for present and future fees are not "business transactions" within meaning of disciplinary rule prohibiting entry into business transactions with client); Burk v. Burzynski, 672 P.2d 419 (Wyo. 1983) (held that taking an assignment of a cause of action regarding real estate, as security for fees on another matter, did not constitute a business transaction with a client, where the assignment was not an absolute conveyance); Caro v. Hansen, 875 P.2d 512 (Ore. 1994) (where the Oregon Supreme Court held that taking an assignment of stock certificates as security for an attorney's fee did not constitute a business transaction with a client); and Twachtman v. Hastings, 727 A.2d 791, 795, and f.3 (Conn. App. 1999) (held that a mortgage used to secure payment

of attorney fees was a permissible security interest), cert. denied 733 A.2d 851 (Conn. 1999).

One reason for concluding that taking a note and deed of trust to secure payment of past services is not a business transaction that is prohibited by Rule 1.8(a), is found in Iowa State Bar v. McCullough, where the Court there stated:

> "Business transaction" suggests to us a commercial activity engaged in for a profit. We think the framers of DR 5-104(A) had in mind a myriad of commercial ventures in which lawyers and clients might engage with a view to making a profit... "Business transactions are frankly impersonal and commercial in character." Here the apparent purpose of the mortgage and confession of judgment was to give (the attorney) security for his present and future fees. A consensual security transaction is far different from a commercial venture entered into for a profit. (Accordingly), the commission correctly determined that DR 5-104 (A) did not cover the mortgage and confession of judgment transactions.

465 N.W.2d at 884.

Another reason for concluding that the taking a note and deed of trust as security for a fee is not a "business transaction" within the context of Rule 1.8(a), is articulated in Schroeder v. Case, 43 P.3d at 452-453, where the Oregon Court of Appeals found:

> Defendants cite no case, and we can find none, in which the business transaction at the core of this rule (DR 5-104(A)) is the fee agreement between the lawyer and the client. Rather, the cases apply the rule when a lawyer and client have entered into a transaction that is unrelated substantively to the formation or structure of the lawyer-client relationship itself, for example when a lawyer arranges to borrow money from a client... lend money to a client for a business venture, or receive a gift from a client. Although it is possible that the lawyer-client fee arrangement is a business transaction and the lawyers interests in it differ from the clients . . . [citation omitted]. . . it is unlikely that in negotiating a fee payment the client expects that the attorney is

using his or her best judgment for the protection of the client.

iii. Several other states have concluded that taking a deed of trust to secure legal fees does not amount to acquiring a proprietary interest in the cause of action or subject matter of litigation, in violation of Rule 1.8(j).

Several courts have concluded that a deed of trust to secure payment of fees does not amount to a proprietary interest in the cause of action. This includes the Arizona Supreme Court, which held that an assignment of a beneficial interest of a deed of trust, intended to secure payment of attorney fees, does not violate Rule 1.8(j), which prohibits attorneys from acquiring a proprietary interest in the subject matter of the litigation. Skarecky & Horenstein v. 3605 N. 36th St. Co., 825 P.2d 949, 953 (AZ 1992). "The assignment creates only a security interest, which, if the client fails to pay his attorney, is enforceable in an independent action against the debtor." 825 P.2d at 953. "An attorney

may accept an assignment of a client's property involved in the litigation so long as it is not absolute and is limited to security for his fees. An absolute assignment would create an impermissible proprietary interest." 825 P.2d at 952. "This result reinforces, and in no way undermines, the policy supporting ER 1.8(j). Referring to DR 5-103(A), the predecessor to ER 1.8 (j), the Arizona Supreme Court has stated the purpose behind the rule:

> Acquisition by a lawyer of a proprietary interest in a cause of action he is conducting for a client is expressly prohibited by DR 5-103(A), because if an attorney acquires an interest in the outcome of a suit *in addition to his fees*, it can lead to the attorney placing his own recovery ahead of his client. For example he might urge a settlement which would be to his best interest but not to the best interest of the client. ABA, Opinions of Professional Ethics, No. 288 (1967) Arizona Ethics Opinions 76-26.

In re Stewart, 121 Ariz. 243, 245, 589 P.2d 886, 888

(1979) (emphasis added).

> Where an assignment is limited to security for fees, and thus is not absolute, an attorney acquires no interest greater than payment of his fees.

Skarecky, 825 P.2d at 952.

There are several other public policy reasons for concluding that taking a note and deed of trust to secure payment of past services does *not* amount to acquiring a proprietary interest in the 1.8(j) context. They include the following:

> An attorney accepting an assignment as security would be placed in a position similar to an attorney employed under a contingent fee arrangement. Both fee arrangements could arguably affect an attorney's independent judgment, but both provide greater access to legal services. Security arrangements provide attorneys with a lien that may have priority over any others that may subsequently arise during the litigation. Therefore, legal representation will be more readily

> available to clients with numerous creditors. Skarecky, 825 P.2d 949, 953 (AZ 1992).
>
> Under the ethical rules, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens... A general prohibition against such security could place the lawyer at a substantial disadvantage to other creditors of the client or the owner of the property. Committee on Professional Ethics and Conduct v. McCullough, 468 N.W.2d 458 (Iowa 1991).
>
> Although the firm acquired an interest in the result of the action, it did not acquire an interest in the cause of the action. Skarecky, 825 P.2d at 952.

iv The Petitioner could not have known that a deed of trust is not a "lien granted by law" at the time he secured his fees, because this too was a matter of first impression in Colorado and other states concluded otherwise.

Colo. R.P.C. 1.8(j) provides that "a lawyer shall not acquire a proprietary interest in the cause

of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may acquire a lien granted by law to secure the lawyer's fee or expenses;..." In this case, the Colorado Supreme Court agreed with the PDJ who found that "the attorney's charging and retaining liens under C.R.S. §12-5-119, are the only liens *granted* by law to secure the lawyer's fees", as that term is used in Colo. R.P.C. 1.8(j). Accordingly, the Supreme Court affirmed the order for summary judgment against the Petitioner for violating Colo. R.P.C. 1.8(j), because a deed of trust used to secure the lawyer's fee is not granted by law. However, this issue was a matter of first impression at the time the Petitioner was disciplined. Although the Court cited People v. Smith, 830 P.2d 1003 (Colo. 1992) as authority for the above proposition, Smith did not decide whether the phrase "a lawyer may acquire a lien *granted by law* to secure the lawyer's

fees or expense" includes consensual liens, like a deed of trust. Rather, it merely held that a lawyer cannot enforce an attorney lien by recording it without first reducing it to a judgment, especially when the attorney did not even submit a bill to the client, and that it was grounds for discipline when the lawyer in Smith refused to release the attorney lien. Thus, Smith does not apply here.

In contrast, other Western states have held that the phrase "a lien granted by law to secure (the lawyers) fee or expenses" would include a lien established by agreement between an attorney and his client with regard to an assignment of the client's property", if the assignment was not absolute. In re May, 98 Idaho 858, 861, n. 2, 538 P.2d 787, 790, n. 2 (1975). See also Burk v. Burzynski, 672 P.2d 419, 423-424 (Wyo. 1983) (interpreted the language "a lawyer may acquire a lien granted by law to secure his fee or expenses", as

being a valid assignment under the Code of Professional Responsibility, which created a security interest in specified collateral in favor of an attorney for payment of his fees).

Although the Petitioner acknowledges that the Colorado Supreme Court can define the phrase a "lien granted by law" to secure the lawyers fees or expenses in Colo. R.P.C. 1.8(j), to not include a consensual deed of trust, it is a denial of the Petitioner's right to due process of law to impose discipline here, because the Petitioner was denied a reasonable opportunity to know what was prohibited at the time he secured his fees, so that he could act accordingly. No Colorado attorney could have known that the Colorado Supreme Court would clarify Colo. R.P.C. 1.8 (a) and (j) to prohibit the taking of a deed of trust to secure attorney fees, at the time the Petitioner secured his fees. As a result, this Court must reverse the decision to impose discipline for violating Colo. R.P.C. 1.8(a)

and (j).

> When an attorney's constitutional rights have been violated, we have not hesitated in the past to reverse disciplinary sanctions that were even less severe than a pubic reprimand. Moreover, a public reprimand.. exacts a potentially severe deprivation of liberty and property interests that are fully protected by the Due Process Clause. The reprimand brands (the attorney) as an unethical attorney who has violated his solemn oath of office and committed a "willful breach" of the Code of Professional Responsibility, and it has been published in statewide professional journals and the official reports of the (State) Supreme court.

Zauderer v. Office of Disciplinary Counsel Supreme Court Ohio, 471 U.S. 626, 669, 105 S. Ct. 2265, 85 L.Ed.2d 652 (1985).

> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process guarantees must scrupulously be observed. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

Zauderer, 471 U.S. at 634, fn 16.

VI. CONCLUSION

The Petition for Writ of Certiorari should be granted because the Colorado Supreme Court decided an important question of federal law, that has not been, but should be, settled by this Court, namely whether the People in attorney disciplinary proceedings should be compelled to produce exculpatory information which goes to an attorney's guilt and/or punishment, as a matter of due process of law.

The Petition for Writ of Certiorari should also be granted so this Court can reverse disciplinary sanctions that were imposed for conduct that was not known to be prohibited by members of the bar, and caused men of common intelligence to guess as to the meaning of Colo. R.P.C. 1.8(a) and (j) and differ as to their application, in violation of the Petitioner's right to

due process of law.

DATED THIS 1st day of June, 2009.

Respectfully submitted,

Robert S. Fisher

ROBERT S. FISHER, #14996
Petitioner

PEOPLE v. FISHER
203 P.3d 1192 (CO 2007)
The PEOPLE of the State of Colorado,
Complainant
v.
Robert Scott FISHER, Respondent.

Nos. 06PDJ038, 06PDJ 104.

Office of the Presiding

Disciplinary Judge of the

Supreme Court of Colorado.

October 30, 2007

Attorney Regulation. Following a hearing pursuant to C.R.C.P. 251.18, a Hearing Board suspended Robert Scott Fisher (Attorney Registration No. 14996) from the practice of law for a period of six months, all stayed upon the successful completion of a two-year period of probation with conditions. The Colorado Supreme Court affirmed the Hearing Board's sanction on February 9, 2009. Respondent secured a deed of trust from his client to assure payment of his fees while representing her in a divorce proceeding. He thereafter exercised his rights in the deed, but failed to follow through with the steps necessary

to secure court ordered benefits for his client. Respondent's misconduct constituted grounds for the imposition of discipline pursuant to C.R.C.P. 251.5 and violated Colo. RPC 1.1, 1.3, 1.8(a) and 1.8(j).

On July 24-26, 2007, a Hearing Board composed of KAY SNIDER, JOHN E. HAYES, both members of the Bar, and WILLIAM R. LUCERO, the Presiding Disciplinary Judge ("the Court"), held a hearing pursuant to C.R.C.P. 251.18. Charles E. Mortimer, Jr., appeared on behalf of the Office of Attorney Regulation Counsel ("the People"). Robert Scott Fisher ("Respondent") appeared *pro se*. The Hearing Board issues the following Opinion and Order Imposing Sanctions Pursuant to C.R.C.P. 251.19 based upon the presentation of the parties.

OPINION AND ORDER IMPOSING SANCTIONS PURSUANT TO C.R.C.P. 251.19

I. *ISSUE*

Suspension is appropriate when a lawyer *knowingly* fails to perform client services. Public censure is appropriate when a lawyer *improperly* acquires a pecuniary interest adverse to his client. Respondent secured a deed of trust from his client to assure payment of his fees while representing her in a divorce proceeding. He thereafter exercised his rights in the deed, but failed to follow through with the steps necessary to secure court ordered benefits for his client. What is the appropriate sanction for his misconduct?

II. *SUMMARY*

The Hearing Board specifically finds clear and convincing evidence in the *first* Complaint that Respondent violated:(fn1)

> Colo. RPC 1.1, Count V, (a lawyer shall provide competent representation to a client), and Colo. RPC 1.3, (A lawyer shall not neglect a legal matter entrusted to him).

The Hearing Board does *not* find clear and convincing evidence as to Colo. RPC 1.7(b), Count III, (a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities

to the lawyer's own interests). With regard to the *second* Complaint, the Hearing Board does *not* find clear and convincing evidence as to:

> Colo. R.P.C. 3.3(a), First Claim, (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal, (no duty to disclose));

> Colo. R.P.C. 3.4(c), Second Claim, (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal

except for an open refusal based on an assertion that no valid obligation exists); and

Colo. R.P.C. 8.4(c), Third Claim, (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

SANCTION IMPOSED: ATTORNEY SUSPENDED FOR SIX MONTHS, ALL STAYED UPON THE SUCCESSFUL COMPLETION OF A TWO-YEAR PERIOD OF PROBATION WITH THE CONDITION THAT RESPONDENT SUCCESSFULLY COMPLETE THE OFFICE OF ATTORNEY REGULATION'S ETHICS SCHOOL.

II. *PROCEDURAL HISTORY AND BACKGROUND*

On June 6, 2006, the People filed case number 06PDJ038. Respondent filed his answer on July 10, 2006. On April 23, 2007, the Court granted a motion for summary judgment filed by the People as to Claims I and II of the *first* Complaint and denied the People's motion as to Claim IV.

On December 27, 2006, the People filed 06PDJ104 and the Court consolidated it with 06PDJ038. Respondent filed an answer to the *second* Complaint on January 18, 2007. Respondent filed numerous motions for summary judgment on the consolidated cases and Court denied each of them.

III. *FINDINGS OF MATERIAL FACT*

The Hearing Board considered the testimony of witnesses and exhibits admitted into evidence, and now makes the following findings of material fact by clear and convincing evidence.(fn2)

Respondent took and subscribed the Oath of Admission and gained admission to the Bar of the Colorado Supreme Court on November 1, 1985. He is registered upon the official records of the Colorado Supreme Court, Attorney Registration No. 14996. Respondent is therefore subject to the jurisdiction of this Court in these disciplinary proceedings pursuant to C.R.C.P. 251.1(b).

Shirley Varner Retains Respondent

Respondent is a sole practitioner from Colorado Springs who specializes in family law. On June 12, 2003, Shirley Varner retained Respondent to represent her in a divorce case. Mrs. Varner was approximately fifty years old at the time. She had been married to Mr. Varner for thirty-four years and they had raised two children. She had retired from federal civil service with a disability for which she received approximately $785.00 per month.(fn3) At the time of the divorce, she suffered from depression, diabetes, recent back surgery, and emotional distress as a result of her son's recent suicide.

When Mrs. Varner hired Respondent, her case had already been set for a final orders hearing. Soon after Ms. Varner retained Respondent, they entered into a written fee agreement where she initially paid him a retainer of $2,000.00.(fn4) In conferring with Respondent, Mrs. Varner advised him that she wanted to remain in the marital residence and secure her right to survivor benefits in her husband's federal retirement plan through the Office of Personnel Management ("OPM"). Equity in the marital residence and the husband's pension plan were the principal assets of the marital estate.(fn5)

OPM rules and regulations outline the process a claimant must follow before they will

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alter the named beneficiary of a pension plan. A state court order may or may not be recognized by the OPM depending in part upon the language of the order *and* compliance with the OPM's regulations in processing such an order. In discussing her desire to obtain a survival benefit from her husband's federal retirement plan, Mrs. Varner asked Respondent if he had ever processed such a claim. Respondent assured her that he knew how to secure such benefits. As a result, Mrs. Varner expected him to process and secure the survival benefits in her husband's retirement plan.

Respondent Presents a Promissory Note and Deed of Trust to Mrs. Varner

On November 7, 2003, shortly before the court completed the final orders hearing, Respondent met with Mrs. Varner to discuss the status of her bill. At that time, she still owed Respondent $3,102.00 for services he had already provided to her.(fn6) Respondent then asked Mrs. Varner if she would be willing to sign a promissory note secured by a deed of trust on the marital residence. He explained to her that these documents were necessary to ensure payment of his fees, but that courts often ordered husbands to pay these fees. While Mrs. Varner signed both documents, she did so with reservation.(fn7) She felt concerned that such an encumbrance on the deed might make it more difficult to sell her home in the future. From this point forward, Mrs. Varner started to question whether Respondent was acting in her best interests.

The approximate amount of equity in the Varners' home was $14,134.00.(fn8) The terms of the deed of trust and promissory note did not allow Respondent to foreclose on her residence and he could only collect his fees if the house was sold or refinanced. The promissory note had an annual interest rate of 8% on the principal amount due at that time ($3,102.00). Mrs. Varner also understood that payment of $3,102.00 covered *all* of Respondent's fees, including additional work Respondent needed to complete in order to secure her survivor benefits with OPM.

Respondent neither told Mrs. Varner of the advisability of seeking independent counsel before signing the deed of trust and promissory note nor did he give her a reasonable opportunity to do so. Furthermore, Respondent did not obtain the client's consent in writing as required by Colo. RPC 1.8(a)(2) and (3).(fn9)

Final Orders

On November 12, 2003, the court concluded the final orders hearing and ordered the sale of the Varner residence and ordered the parties to pay their own attorney's fees even though Respondent had argued that Mrs. Varner should be awarded attorney's fees. The court also ordered that Mrs. Varner receive half of her husband's retirement benefits during his life and survivor benefits should he predecease her. Although the court did not grant his request, Respondent also argued that Mrs. Varner be allowed to receive maintenance. The court did order, however, that Mr. Varner pay Mrs. Varner $1.00 a year so that the court would maintain jurisdiction in the event that Mr. Varner received additional income following the divorce.(fn10)

Following the final orders hearing, the court entered its written order on January 20, 2004, based on a draft Respondent provided to the court. However, in drafting the order, Respondent failed to research OPM regulations to determine whether the language of his draft would protect his client's

interest under the OPM rules and regulations.

The written decree awarded Mrs. Varner both a present one-half interest in Mr. Varner's federal pension, and survivor benefits from Mr. Varner's pension. The decree states:

> Husband shall provide Wife with Survivor Benefit Plan (SBP) protection/insurance so Wife can continue to receive a share of Husband's future retirement benefits if Husband predeceases Wife.(fn11)

On November 12, 2003, the date the court issued its final orders, Respondent neither advised the court nor opposing counsel that he had obtained an interest in the marital residence nor did he supplement Mrs. Varner's previously filed affidavit with respect to financial affairs to show that he had taken a lien against the marital residence.(fn12) Furthermore, during this hearing, Respondent tendered a document to the court, which calculated the equity in the marital residence by subtracting estimated realtor commissions and encumbrances, including only the first and second mortgages against the residence, from an appraised value of the residence. The exhibit did not disclose that Respondent had

acquired a deed of trust encumbering the marital residence.(fn13)

Leading up to, and following permanent orders, Mrs. Varner reiterated her concern about securing her half-interest in her husband's pension benefits. She gave Respondent OPM's phone number and asked him to call them. Mrs. Varner also told Respondent that she did not feel comfortable with Mr. Varner writing a check from his bank account to her each month in order to comply with his obligation to provide her half of his pension benefit monthly. She wanted the money to be sent directly to her from OPM. Although Mrs. Varner expressed these concerns, Respondent did not call OPM.

Because Respondent failed to secure Mrs. Varner's benefits with OPR, she received one-half of Mr. Varner's pension reliant upon her former husband's willingness to write her a check each month, not because OPM recognized that she was entitled to receive these funds directly from them based upon the state court's final orders.

Contrary to his earlier assurances to Mrs. Varner, Respondent had never processed a claim with OPR and was unaware of the procedures the federal government required to secure her interests in Mr. Varner's pension. Had Respondent inquired of OPM as Mrs. Varner requested, he would have discovered that the process was complex.(fn14) Because of the nuances of OPM rules, general practitioners often consult a lawyer with experience in processing a retirement or

pension claim with OPR.(fn15)

Mrs. Varner Orders Respondent to Stop Working

By March 29, 2004, Mrs. Varner believed Respondent had all of the information he needed to secure her benefits as the court ordered. She was also distrustful of him at this point and thought that his only purpose in calling her was to charge her additional fees for the calls or proposed office visits. She therefore directed Respondent to "stop all work" on her behalf.

Furthermore, Mrs. Varner felt Respondent and the real-estate agent he hired to sell her house were "ganging up" on her and unjustifiably accusing her of resisting their efforts to her home. She realized that her home had to be sold as the court ordered, but she was frequently unavailable due to her mental and physical conditions.

Respondent Agrees to be Appointed Agent to Sign Closing Documents

On May 5, 2004, Mr. Varner's divorce attorney conferred with Respondent and later

filed a motion requesting that Respondent be appointed by the court to sign documents for Mrs. Varner at the closing of the sale of the marital

residence. This motion, which contained a reference to Mrs. Varner's alleged lack of cooperation in the sale of the marital residence, was filed with Respondent's knowledge and concurrence. On May 7, 2004, the Court granted the motion. Respondent never informed Mrs. Varner about this pleading.

Mrs. Varner checks the Court Record

Given her lack of confidence in Respondent, Mrs. Varner went to the courthouse to find out what action, if any, Respondent had taken on her behalf. In early May 2004, she discovered the order that authorized Respondent to sign the closing documents if she did not appear at the closing for the sale of her house. The motion, dated May 6, 2004, requesting the appointment of Respondent contained the following statement, "He [Respondent] agrees that the sale of the home is in his client's best interests and *acknowledges his client's potential risk to be cited for contempt if the transaction is not completed because of his client's actions.* "(fn 16) In fact, Mrs. Varner had sent a certified letter to Respondent on May 4, 2004, stating that she intended to attend the closing.(fn17) Although Mrs. Varner advised Respondent that she intended to attend the closing, she was not willing sign any document that stated, "all proceeds" were payable to Respondent.(fn18)

Respondent Takes Action to Secure His Fees

On May 6, 2004, Respondent filed a notice of attorney's charging lien pursuant to C.R.S. § 12-5-119 in El Paso District Court, 02DR4721, the divorce case, claiming attorney's fees in the amount of $6,640.97 *and* asserting a claim to Mrs. Varner's share of the proceeds of sale of the residence. On May 25, 2004, Respondent amended his lien to include other obligations that Mr. Varner owed to Mrs. Varner pursuant to the decree dissolving their marriage.(fn19)

In dealing with the title company on the sale of the Varner's home, Respondent asked the title company to make the proceeds checks payable to him and not Mrs. Varner.(fn20) Respondent wrote to the title company to ask them to assist him in collecting his fees ostensibly as Mrs. Varner's lawyer although she explicitly terminated him on March 29, 2004. In spite of Respondent's suggestion to the title company that he alone sign the closing documents and receive all the proceeds, they insisted that Mrs. Varner agree to such an arrangement and sign all closing documents.

The closing of the Varner residence occurred on May 25, 2004. Both Respondent and Mrs. Varner attended the closing. Respondent's promissory note for $3,102.00, plus interest, was paid from the proceeds of the sale, and his deed of trust was released. Respondent also received and retained the balance of the sales proceeds ($4,095.13) in trust based upon his attorney's lien in 02DR4721. The People do not contest the reasonableness of these fees or whether Respondent earned them.

Though the People do not question Respondent's fees, the attorney-client relationship between Mrs. Varner and Respondent had significantly deteriorated based

upon the fees he charged her. At the closing, Respondent advised Mrs. Varner that he would be getting *all of the equity, both hers and Mr. Varner's,* from the sale of the house. Mrs. Varner questioned whether Respondent should receive all of the equity in the marital property, but nevertheless signed the documents authorizing him to receive them.

While Respondent secured his legal fees following final orders in the divorce case, he did not take any action to secure his client's

survival benefits in Mr. Varner's pension. On June 4, 2004, he filed a motion to enforce his attorney's lien in the Varner dissolution of marriage action. The motion did not include a claim for the fees he charged Mrs. Varner for services associated with the collection of his fees, approximately $350.00. Thus, Respondent did not seek a judicial order or judgment awarding him $350.00 for the time associated with collection.

Respondent's rationale for keeping $350.00 more than the court allowed in its order is that his fee agreement allowed him to collect these funds. The fee agreement specifically states:

> In the event that legal action is necessary to recover attorney fees and costs from Client, Firm shall be entitled to its reasonable attorneys fees incurred in said legal proceedings, and for fees and costs incurred in the collection of what is

due and owing. *Firm shall be entitled to its attorneys fees incurred for collection, whether or not suit is brought* (emphasis added).(fn21)

In his motion to enforce attorney's lien, Respondent also filed a form of order to enforce attorney's liens. District Court Judge Gilbert Martinez signed it on June 25, 2004. authorizing

Respondent "to retain $3,581.63 of the $4,095.13 in his trust account, to satisfy the Petitioner's contractual obligations to him." Respondent thereafter mailed a letter to Mrs. Varner dated July 29, 2004, in which he advised her that he was keeping $350.00 based on the work he performed to enforce his attorney's lien.

On June 4, 2004, after collecting all of the proceeds from the Varner closing, filing his attorney's lien, and collecting the $350.00 he "incurred" in collecting his fees, Respondent filed a notice to withdraw from Mrs. Varner's case.(fn22) Before withdrawing, however, Respondent sent a letter to Mrs. Varner notifying her that he intended to withdraw from her case if she did not schedule an appointment with him. Respondent also wrote, "I would like to review the specific charges that you believe were improperly made to your account so I can determine whether an adjustment should be made to your account."(fn23) Respondent, however, made no mention of his failure to call or inquire of OPM about Mrs. Varner's survivor benefits as she requested of him shortly after

final orders in January 2004.

OPM Stops Mrs. Varner's Benefits After Mr. Varner Dies

On April 22, 2005, Mr. Varner unexpectedly died of a heart attack. Since Mrs. Varner had to rely on Mr. Varner to write a check to her each month, she stopped receiving her half-share of his pension. Mrs. Varner, then filed a claim based upon her divorce decree, but her petition was denied, as was her appeal of the initial decision. She then sought the intervention of Congressman Joel Hefley.

Mrs. Varner received no benefits from May 2005 until November or December 2005. This loss of income caused her to forgo certain medications and caused her to be late on a number of her financial obligations. Ultimately, however, all of the benefits that had not been paid to Mrs. Varner were reimbursed to her. The evidence is insufficient to conclude that Congressman Hefley's inquiry of OPM's denial of Mrs. Varner's survival benefits influenced OPM to pay the claim they had earlier disputed. Further, insufficient evidence exists to find that the reason OPM ultimately recognized Mrs. Varner's claim to survival benefits in Mr. Varner's pension plan was based upon the final orders he prepared in the divorce court.

IV. *CONCLUSIONS OF LAW -- SUBSTANTIVE ALLEGATIONS*

The Hearing Board finds clear and convincing evidence in the *first* Complaint as to the following claims:(fn24)

Respondent violated Colo. RPC 1.3, (A lawyer shall not neglect a legal matter

---

entrusted to him). The comments to Colo. RPC 1.3 state, "Unless the relationship is terminated as provided by Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client." Respondent undertook the task of securing his client's survival benefits in her husband's pension plan. While Respondent won a judgment from the trial court awarding Mrs. Varner these benefits, he did not take the next step to secure them. Thus, he did not accomplish one of his client's primary objectives for the representation.

In addition, Respondent violated Colo. RPC 1.1 (a lawyer shall provide competent representation to a client). In order for Respondent to competently represent Mrs. Varner, Respondent should have researched the necessary process to secure his client's benefits. "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards

of competent practitioners." Comments Colo. RPC 1.1. If Respondent had taken these reasonable steps, he could have, at a minimum, been able to advise his client of the potential injury she might suffer if he was not allowed to continue working on her case to secure her benefits.

The Hearing Board considered Mrs. Varner's conduct following the final orders and her unwillingness to answer Respondent's calls. The evidence reveals that Respondent found it difficult to communicate with her following final orders. While her actions mitigate his ethical lapses, they do not excuse them.

With regard to the *first* Complaint, the Hearing Board finds that the evidence is not clear and convincing that Respondent violated Colo. RPC 1.7(b), Count III, (a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to the lawyer's own interests). Respondent had a right to collect his attorney's fees in the domestic court. An attorney may assert the lien in the action in which the attorney performed his services or by separate action. *Crabtree v. Crabtree,* 192 Colo. 550, 560 P.2d 835, 836 (1977).

And while it appeared to Mrs. Varner that the manner in which Respondent collected his fees was "sleazy," he had a right to collect his

fees. Except for his lack of diligence and competence in securing her pension benefits, Respondent was a zealous advocate on behalf of his client. Further, there is no evidence to suggest Respondent did not earn the fees he collected. Given these circumstances, the evidence of a conflict is not clear and convincing.

With regard to the *second* Complaint, the Hearing Board cannot find clear and convincing evidence as to:

> Colo. R.P.C. 3.3(a), First Claim, (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal);
>
> Colo. R.P.C. 3.4(c), Second Claim IV, (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists); and
>
> Colo. R.P.C. 8.4(c), Third Claim, (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

The Hearing Board notes that these charges were brought nearly six months after the filing of

the initial complaint. While the Hearing Board finds that it might have been better practice for Respondent to advise the court of his interest in the Varner residence, and the provisions in his fee agreement that allowed him to keep $350.00 more than the court ordered, there is no evidence to demonstrate that such disclosures would have changed the court's order regarding the sale of the residence. In fact, the evidence is to the contrary. As one judicial officer testified during the hearing, such information is not material in a determination of final orders.

V. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* (1991 & Supp.1992) ("ABA *Standards*") and Colorado Supreme Court case law are the

guiding authorities for selecting and imposing sanctions for lawyer misconduct. The appropriate sanction depends upon the facts and circumstances of each case.

Analysis Under the ABA Standards

Suspension is generally appropriate when a lawyer fails to perform services for a client. ABA *Standards* 4.42. However, in imposing a sanction after a finding of lawyer misconduct, ABA

Standard 3.0 directs the Hearing Board to first consider the following factors:

(1) the duty violated;

(2) the lawyer's mental state;

(3) the actual or potential injury caused by the misconduct; and

(4) the existence of aggravating or mitigating factors.

A. THE DUTY VIOLATED

Respondent violated duties to his client, the legal system, and the legal profession by failing to diligently pursue his client's interests. *See* Colo. RPC 1.2 (a lawyer shall abide by a client's decisions concerning the scope and objectives of the representation). Here, Mrs. Varner made it clear from her first meeting with Respondent that she wanted to secure a survival benefits in her husband's pension. Respondent assured her that he knew how to achieve this objective when he did not. Respondent also had a duty under the rules to advise Mrs. Varner under Colo. RPC 1.8 before taking a deed of trust on her home to secure his fees.

B. THE LAWYER'S MENTAL STATE

Respondent acted knowingly throughout his representation of Mrs. Varner. He was aware of

his conduct when he failed to follow through and process Mrs. Varner's survival benefits. Likewise, he acted knowingly when he obtained a deed of trust and promissory note from Mrs. Varner. While the Hearing Board finds that Respondent may not have been aware that his conduct violated Colo. RPC 1.8, this is not necessary to our finding of knowing conduct.

C. THE ACTUAL OR POTENTIAL INJURY

It was reasonable for Mrs. Varner to believe Respondent knew how to process an OPM claim after he made such assurances. But he was completely unaware of the process and the potential harm Mrs. Varner could suffer if her claim was not processed according to OPM procedures. At a minimum, there was serious *potential* injury to Mrs. Varner based upon Respondent's lack of diligence.

Furthermore, the profession is potentially injured each time one of its own fails to recognize that the practice of law is a profession with ethical obligations to the clients served and not simply a matter of running a business. Here, the impression Respondent left with Mrs. Varner was that he was much more interested in making money than protecting her interests.

Even though the Hearing Board finds a potential for serious injury, we are mindful that Mrs. Varner's physical and mental condition

made it difficult for Respondent to complete her objectives following final orders.(fn25) Nevertheless, Mrs. Varner had a reasonable expectation that Respondent would secure survival benefits from her former husband's federal pension.

D. AGGRAVATING AND MITIGATING FACTORS

1. MATTERS IN AGGRAVATION, ABA STANDARD 9.2

The Hearing Board considered evidence of the following aggravating circumstances in deciding the appropriate sanction to impose.

Selfish Motive -- 9.22(b)

The Hearing Board finds that Respondent's actions were motivated in part by his personal financial interests. We also recognize Respondent had a right to collect his fees. But we find that Respondent failed to follow through with her claim for half of her husband's pension benefit while zealously pursuing his personal interest in securing his fees. While we find this factor, we do not

weigh it heavily because Mrs. Varner stopped communicating with Respondent. Thus, his lack of action was not entirely based upon his selfishness. Mrs. Varner's unavailability was a

significant factor.

Refusal to Acknowledge Wrongful Nature of Conduct--9.22(g)

While Respondent has cooperated in these proceedings, he has not demonstrated remorse for the potential injury he caused his client. Instead, Respondent argued in these proceedings that he helped, rather than injured, a client who would otherwise would have had to face a divorce without representation. He does not see his lack of diligence in any way contributing to the potential and actual injury Mrs. Varner suffered. Instead, he blames her for not contacting him and the OPM for making a mistake in initially denying her claim for benefits.

Vulnerability of the Victim--9.22(h)

The Hearing Board finds Mrs. Varner vulnerability was exacerbated by her mental and physical condition. But we temper this finding. Respondent should not be held accountable for his client's failure to communicate.

Substantial Experience in the Practice of Law--9.22(i)

Respondent has practiced law for approximately twenty-two years while specializing in domestic cases.

2. MATTERS IN MITIGATION, ABA STANDARD 9.3

The Hearing Board considered evidence of the following mitigating circumstances in deciding the appropriate sanction to impose.

Absence of Prior Discipline--9.32(a)

Respondent has practiced as a solo lawyer specializing in domestic cases without a single blemish on his record. Difficult clients and issues are common to this practice. The Hearing Board gives *great* weight to this factor.

Cooperative Attitude in the Proceedings--9.32(e)

Although Respondent vigorously defended himself in these proceedings, he was cooperative

and respectful.

Delay in the Disciplinary Proceedings--
9.32(i)

The original complaint in this case was filed in June 2006. The case was not heard until July 2007. In part, the People's action in filing a second complaint and consolidating it with the original complaint occasioned a significant delay in these proceedings.

Analysis Under Case Law and ABA Standards

Colorado Supreme Court case law applying ABA *Standards* 4.42 hold suspension is the presumptive sanction when a lawyer causes potential injury by knowingly failing to perform services for a client. *People v. Barber,* 799 P.2d 936 (Colo.1990) (citing ABA *Standard* 4.42 the Colorado Supreme Court suspended a lawyer for six months for missing the statute of limitations). *But See People v. Yaklich,* 744 P.2d 504 (Colo.1987) (one year suspension for neglect of custody support matter and failure to carry out client's objectives).

There are no Colorado cases directly on point dealing with a combination of lack of diligence and a failure to abide by the provisions of Colo. RPC 1.8. Analyzing each of the factors outlined above, the Hearing Board finds that a suspension is appropriate. *See In the Matter of Taylor,* 741 N.E.2d 1239, 1243 (Ind.2001), (where lawyer

received an interest in a client's marital property in violation of rule 1.8(a)). In this case, the court specifically found "The *Rules of Professional Conduct* place restrictions on business transactions between lawyers and their clients based on an assumption that the lawyer in such dealings will generally possess, for various reasons, an unfair advantage in bargaining position." Respondent exacerbated this problem by not diligently carrying out the scope and objectives of the representation his client articulated. *See also* Colorado Bar Association Formal Opinion 110 and

American Bar Association Formal Opinion 02-427.

VI. *CONCLUSION*

One of the primary goals of our disciplinary system is to protect the public from lawyers who potentially pose a danger to them. In this case. Respondent's failure to comply with the provisions of Colo. RPC 1.8 followed by his lack of diligence and competence in pursuing one of his client's primary objectives in the divorce case caused potential and real harm to his client.

There is no question that Mrs. Varner was a difficult client with whom to communicate. Nevertheless, Mrs. Varner's lack of communication does not excuse Respondent's failure to abide by his ethical duties.

In stark contrast to his inadequate efforts to secure Mrs. Varner's benefits in her husband's pension, Respondent demonstrated resolve in collecting his fees. It is not surprising Respondent's swift and successful collection of fees with the simultaneous lack of zeal in securing her husband's pension benefits caused Mrs. Varner client to question Respondent's ethics.

While Respondent had a right to take a deed of trust and promissory note to secure payment of fees from Mrs. Varner, he also had the ethical responsibility to do so properly under Colo. RPC 1.8. Further, Respondent's conduct goes beyond a failure to follow the prescriptive requirements of Colo. RPC 1.8. Respondent caused real and potential injury to his client.

VII. ORDER

It is therefore ORDERED:

1. ROBERT SCOTT FISHER, Attorney Registration No. 14996, is hereby SUSPENDED from the practice of law in the State of Colorado for a period of SIX MONTHS, ALL STAYED upon the successful completion of a two-year period of probation with the condition that he attend and successfully pass the Office of Attorney Regulation Counsel's Ethics School within one year of the date of this order.

2. ROBERT SCOTT FISHER SHALL

pay the costs of these proceedings. The People shall submit a Statement of Costs within fifteen (15) days from the date of this order. Respondent shall have ten (10) days thereafter to submit a response.

Footnotes:

FN1. Claims I and II have been established by virtue of the Court's ruling on summary judgment in the *first* Complaint.

FN2. The Hearing Board's findings also incorporate stipulated facts submitted by the parties.

FN3. *See* People's Exhibit 2.

FN4. *See* People's Exhibit 1, the fee agreement.

FN5. Respondent advised Mrs. Varner that he would seek spousal maintenance and attorney fees.

FN6. The People do not challenge the reasonableness of Respondent's fees.

FN7. *See* People's Exhibit 3.

FN8. *See* People's Exhibit 4.

FN9. Colo. RPC 1.8(a)(1) states "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client. . . ." The People did not argue that Respondent violated this provision of the rule.

FN10. *See* Respondent's Exhibits C and E.

FN11. *See* People's Exhibit 7. Although Respondent argues that this language gave Mr. Varner and his lawyer the responsibility for processing the pension benefit with the OPM, the normal practice is that the party benefiting from the order is responsible for taking any action necessary to secure the claim.

FN12. See People's Exhibit 5.

FN13. See People's Exhibit 4.

FN14. OPR rules and regulations are published in a forty-page document available to the public.

FN15. *See* the testimony of Thomas Henley.

FN16. People's Exhibit 13 is dated May 6, 2004; two days after Respondent received notice from Mrs. Varner that she planned to attend the closing.

FN17. *See* People's Exhibit 11.

FN18. *See* People's Exhibit 16.

FN19. The court ordered that Mr. Varner pay Mrs. Varner one half of the money she expended to pay for their son's funeral. Mrs. Varner received none of the proceeds from the sale of her home.

FN20. *See* People's Exhibit 14.

FN21. *See* People's Exhibit 1.

FN22. *See* People's Exhibit 22.

FN23. *See* People's Exhibit 19.

FN24. The Court ruled as a matter of law that Respondent violated Colo. R.P.C. 1.8(a) and (j). The Hearing Board therefore makes no findings or conclusions on Claims I or II of the *first* Complaint.

FN25. *See* People's Exhibits 9 and 10.

IN RE FISHER
202 P.3d 1186 (CO 2009)
In the Matter of Robert Scott FISHER.
No. 07SA383.
Supreme Court of Colorado.

February 9, 2009

Rehearing Denied March 2, 2009.

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This Page Contains Headnotes.

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John S. Gleason, Regulation Counsel, Charles E. Mortimer, Jr., Assistant Regulation Counsel, Denver, Colorado, Attorney for the People.

Robert Scott Fisher, Colorado Springs, Colorado, Pro se.

Justice MARTINEZ delivered the Opinion of the Court.

I. Introduction

In this attorney discipline case, both Attorney Regulation Counsel and lawyer Robert Scott Fisher appeal the decision of the Hearing Board. In 2005, Fisher was charged with violating numerous Rules of Professional Conduct(fn1) relating to his representation of Shirley Varner in a dissolution of marriage case. In addition to obtaining a dissolution of marriage order from the trial court, one of Ms. Varner's primary objectives in the case was securing survivor benefits and a portion of her husband's benefits in a federal pension. Fisher did little aimed at securing Ms. Varner rights in the pension. During the course of the representation, Fisher became concerned Ms. Varner would not pay the fees she owed him. Therefore, in order to secure his fees, Fisher obtained a promissory note secured by a deed of trust in Mr. and Ms. Varner's marital residence. After obtaining the deed of trust, Fisher did not amend a financial affidavit filed by Ms. Varner to show his interest in the residence. Pursuant to a trial court order, the residence was sold, and Fisher's promissory note was paid with a portion of the sale proceeds.

Attorney Regulation Counsel charged Fisher with violating Colo. RPC 1.1 (2007), failure to provide competent representation, and Colo.

RPC 1.3 (2007), neglect of a legal matter, for his failure to take action aimed at securing Ms. Varner's rights in the pension. Fisher was also charged with violating Rules 1.7(b)(2007), representation limited by a lawyer's own interests, 1.8(a) (2007), obtaining an interest adverse to a client's without consent or independent counsel, and 1.8(j) (2007), obtaining a proprietary interest in the subject matter of the litigation, for taking the deed of trust in the Varner residence. Finally, Regulation Counsel charged Fisher with violating Rules 3.3(a) (2007), making a false statement of material fact to a tribunal, 3.4(c) (2007), knowingly disobeying an obligation under the rules of a tribunal, and 8.4(c) (2007), conduct involving dishonesty, fraud, deceit, or misrepresentation, for his failure to amend the financial affidavit to disclose his interest in the Varner residence.

The Hearing Board determined Fisher violated the Rules of Professional Conduct by failing to provide competent representation, neglecting a legal matter, obtaining a proprietary interest in the subject matter of the representation, and obtaining an interest adverse to his client's without securing consent or advising the client to seek independent counsel. However, the Hearing Board did not find clear and convincing evidence that Fisher's representation of Ms. Varner was limited by his own interests, that Fisher made a false statement of material fact to the trial court, that Fisher

knowingly disobeyed an obligation under the rules of the trial court, or engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. On appeal, Fisher disputes the findings of the Hearing Board and argues he did not violate any Rules of Professional Conduct. Regulation Counsel argues the Hearing Board erred when it did not find clear and convincing evidence Fisher violated all Rules he was charged with violating.

II. Facts and Proceedings Below

Fisher is a sole practitioner from Colorado Springs who specializes in family law. In

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June of 2003, Shirley Varner retained Fisher to represent her in a dissolution of marriage case. At the time Ms. Varner retained Fisher, the case was already set for a permanent orders hearing. Ms. Varner and Fisher entered into a written fee agreement where Ms. Varner initially paid Fisher a retainer of $2,000. The contract authorized Fisher to charge a $350 collection fee. Ms. Varner informed Fisher that her primary objectives in the dissolution of marriage case were obtaining survivor benefits and a portion of the benefits being paid to her husband from her husbands federal retirement plan through the Office of Personnel Management ("OPM"), and dividing the equity in the marital residence. Ms. Varner suffered from depression, diabetes, a recent back surgery, and emotional distress as a result of her son's recent suicide.

Prior to retaining Fisher, Ms. Varner asked him if he had ever processed an OPM claim and he assured her he knew how to secure OPM benefits. Obtaining OPM benefits is a complex process governed by a number of rules and regulations a beneficiary must follow before the office will alter the named beneficiary of a pension plan. State court orders, such as those issued in dissolution of marriage cases, may be recognized by the OPM depending upon the language of the order and compliance with the OPM's regulations in processing the order. Fisher had never processed an OPM claim and was unaware of the procedures the federal government required to change beneficiaries.

Shortly before the final orders hearing, Ms. Varner met with Fisher and discussed the status of her bill. She owed Fisher $3,102 for services rendered. Fisher presented Ms. Varner with a promissory note in the amount of $3,102 secured by a deed of trust in the marital residence. Fisher asked Ms. Varner to sign the documents, explaining they were necessary to ensure payment of his fees. However, he informed Ms. Varner that courts often order husbands to pay the wives' attorney's fees in dissolution of marriage cases. The terms of the deed of trust and promissory note did not allow Fisher to foreclose on the property, and he could only collect the outstanding amount if the residence was sold or refinanced. At no point did Fisher advise Ms. Varner to seek independent counsel, nor did he give her an opportunity to do so. He also failed to secure her written consent to the

conflict of interest.

Ms. Varner testified that she signed the documents with reservation, and was concerned the encumbrance on the deed might make it more difficult to sell the home in the future. She also stated she understood that $3,102 represented all funds needed to cover Fisher's work, including additional work Fisher needed to complete in order to secure her benefits with the OPM.

At the November 12, 2003 permanent orders hearing, the court ordered that Ms. Varner receive half of her husband's OPM benefits during his lifetime and survivor benefits should he predecease her. The court also ordered the sale of the marital residence with the proceeds to

be divided equally between Mr. and Ms. Varner. The court retained jurisdiction over the case, and ordered each party to pay their own attorney's fees.

Fisher provided the court with a draft of the final orders which the court issued in January 2004. Fisher did not consult OPM rules and regulations when drafting the order. Additionally, he did not advise the court or opposing counsel of his interest in the marital residence or supplement Ms. Varner's financial affidavit to reflect his interest in the property. However, Fisher did provide the court with a document showing the equity Mr. and Ms. Varner had in the marital residence, an estimate of costs associated with sale, and encumbrances on the property. The document did not disclose Fisher's interest in the property.

Following permanent orders, Mr. Varner voluntarily paid Ms. Varner one half of his OPM benefits by writing her a check from his bank account after the OPM paid him the full amount. Ms. Varner testified she did not feel comfortable with Mr. Varner providing the funds directly to her and reiterated her concern to Fisher about securing her interest in Mr. Varner's OPM benefits. She provided Fisher with the OPM telephone number and requested he call them. Fisher failed to do so.

The court appointed a real estate agent suggested by Fisher to market and sell the Varner residence. By March 5, 2004, a contract was in place for the sale of the home at full asking price. However, on or around March 29, 2004, Ms. Varner contacted Fisher and requested he stop all work on her behalf. Ms. Varner stated she had become distrustful of Fisher and feared his only purpose in continuing to call her was to charge her additional fees for the calls and proposed office visits. She also felt he already had enough information from her to secure the OPM benefits.

On May 5, 2004, Mr. Varner's attorney and Fisher consulted and agreed that Mr. Varner's attorney should file a motion requesting the court appoint Fisher to sign documents for Ms. Varner at the closing of the sale of the marital residence. The motion alleged Ms. Varner failed to cooperate in the sale of the marital residence. Fisher did not inform Ms. Varner about this pleading. On May 4, Ms. Varner sent Fisher a certified letter informing him she would attend the closing. Shortly thereafter, Ms. Varner went to the courthouse to determine whether Fisher had taken any further action on the case and discovered the order authorizing him to sign the closing documents.

Fisher and Mr. Varner's attorney also co-authored a letter on Fisher's letterhead to the title company handling the closing informing it all proceeds from the sale of the Varner residence should be directed to Fisher. In the letter Fisher

represented he was acting as Ms. Varner's attorney, even though Ms. Varner had terminated the professional relationship a week earlier. The title company declined to pay all proceeds to Fisher, insisting Ms. Varner agree to the payment arrangement and sign all documents.

On May 6, 2004, Fisher filed a notice of attorney's lien in the El Paso County District Court in the amount of $6,640.97, representing fees owed to him by Ms. Varner. The notice of lien also asserted a claim to Ms. Varner's share of the proceeds from the sale of the marital residence.

Both Fisher and Ms. Varner attended the real estate closing. The title company paid Fisher's promissory note, plus interest, from the proceeds of the sale and Fisher released the deed of trust. The remainder of the sale proceeds were paid to Fisher in trust based upon his attorney's lien. The following month, June 2004, Fisher filed a motion to enforce his attorney's lien in the amount of $3,581.63. The judge signed the order and authorized this amount to be paid from the $4,095 remaining in Fisher's trust account from the sale of the Varner residence. In July 2004, Fisher informed Ms. Varner he was keeping an additional $350 which he incurred in collecting his fees. This amount was not included in the $3,581.63 the court authorized Fisher to receive from the trust account.

During this time period, Fisher made numerous efforts, both via telephone and

written mail. to contact Ms. Varner. Ms. Varner did not respond to Fisher's letters and messages fearing additional charges. After collecting the court ordered $3,581.63 and the $350 collection fee, Fisher filed a notice in July 2004 to withdraw as Ms. Varner's attorney. By this time, Fisher had made no efforts to secure survivor benefits or a portion of Mr. Varner's pension from the OPM. Mr. Varner continued to pay half of his OPM benefits to Ms. Varner after OPM distributed the full amount to him.

On April 22, 2005, Mr. Varner died suddenly as a result of a heart attack. Because Ms. Varner received the OPM payments directly from Mr. Varner, after Mr. Varner's death, Ms. Varner stopped receiving the payments. After his death, Ms. Varner personally filed a claim with the OPM based on the permanent order decree to receive survivor benefits. This claim was denied, as was her appeal of that decision. Ms. Varner received no benefits between May 2005 and December 2005 when the OPM officially recognized her claim to Mr. Varner's survivor benefits. The Hearing Board found there was insufficient evidence to determine why the OPM changed course and recognized Ms. Varner's claim.

On June 6, 2006, Attorney Regulation Counsel filed a complaint against Fisher alleging violation of Colo. RPC 1.8(a) (acquiring an interest adverse to client's without consent) for his failure to advise Ms. Varner

to seek independent counsel when he presented her with the promissory note and deed of trust; Colo. RPC 1.8(j) (proprietary interest in the subject matter of the representation), for taking the deed of trust in the residence; Colo. RPC 1.7(b) (representation limited by the attorney's own interests), for his actions during the sale of the residence; Colo. RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) for paying himself an amount more than the court ordered; and Colo. RPC 1.1 (failure to provide competent representation) and Colo. RPC 1.3 (neglect of a legal matter) for allegedly failing to diligently and competently represent his client with regard to securing interests in the pension benefits.

The following December, Regulation Counsel filed a second complaint, which the court consolidated with the June 2006 complaint. The new complaint alleged violation of Colo. RPC 3.3(a) (false statement of material fact to a tribunal), Colo. RPC 3.4(c) (disobeying an obligation under the rules of a tribunal), and Colo. RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) for Fisher's failure to amend Ms. Varner's financial affidavit to include his interest in the marital residence and providing documentation regarding the Varner's equity in the residence which did not

include Fisher's deed of trust.

In April 2007, the Presiding Disciplinary Judge granted Regulation Counsel's motion for summary judgment, finding violations of the Rules prohibiting an attorney from taking an interest adverse to a client's without consent and from taking a proprietary interest in the subject matter of the representation. The Board denied numerous motions for summary judgment filed by Fisher. On July 24-27, 2007, the Board conducted a hearing pursuant to C.R.C.P. 251.18 and, on October 30, 2007, issued an opinion and order imposing sanctions. In addition to those violations found on summary judgment, the Hearing Board found Fisher violated the Rules requiring competent representation and prohibiting neglect of a legal matter. The Hearing Board dismissed the remaining claims. As discipline, Fisher was suspended for six months, stayed upon successful completion of a two-year period of probation and the Office of Attorney Regulation's Ethics School.

Fisher appeals the Hearing Board's determination that he violated the Rules requiring competent representation, prohibiting neglect of a legal matter, prohibiting an attorney from taking an interest adverse to the client's without consent, and prohibiting the attorney from acquiring a proprietary interest in the

subject matter of the litigation. Fisher additionally argues the Hearing Board lost jurisdiction over the matter because it issued its ruling more than 60 days after the hearing, Regulation Counsel violated his due process rights by failing to disclose possibly exculpatory evidence, and Regulation Counsel's cross-appeal violates the constitutional prohibition against double jeopardy.

Regulation Counsel appeals the Hearing Board's determination there was not clear and convincing evidence Fisher violated the Rules prohibiting false statements of material fact to a tribunal, prohibiting an attorney from knowingly disobeying an obligation under the rules of a tribunal, prohibiting an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and requiring representation not be limited by an attorney's own interests. Regulation Counsel also argues the discipline imposed by the Board was unreasonable and insufficient in relation to the needs of the public.

III. Fisher's Appeal

A. Standard of Review

In disciplinary proceedings, the Hearing Board is the finder of fact and has the authority to make determinations regarding the credibility of witnesses and conflicts in evidence. *In re*

Haines, 177 P.3d 1239, 1244 (Colo.2008). While this court has plenary authority over matters of attorney discipline, we have established standards of review and will disturb the Hearing Board's factual findings only if they are clearly erroneous or not supported by substantial evidence in the record. *Id.*; C.R.C.P. 251.27(b). We conduct a de novo review of the Hearing

Board's conclusions of law. *Haines*, 177 P.3d at 1245.

B. Colo. RPC 1.1

The Hearing Board found clear and convincing evidence that Fisher violated Colo. RPC 1.1, failure to provide competent representation, when he did not research the process necessary to secure Ms. Varner's rights in Mr. Varner's OPM benefits or take any steps toward securing those rights. Fisher argues this determination must be reversed because it was not supported by clear and convincing evidence. We disagree.

Colo. RPC 1.1 states "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The comments provide that, when determining the level of

knowledge and skill a particular matter requires, the Board should look to factors including the complexity and specialized nature of the matter, the lawyer's general experience, and the lawyer's training and experience in the field in question. Colo. RPC 1.1 cmt. "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners." *Id.* While an attorney should generally not accept employment in an area of law in which she is not qualified, she may accept such employment if she in good faith expects to become qualified through study and investigation. *Id.*

The Hearing Board acknowledged Ms. Varner terminated the professional relationship with Fisher shortly after the permanent orders hearing and did not respond to telephone calls or written communications. However, it found that if Fisher had taken any steps to become acquainted with the procedures for securing retirement benefits through the OPM by the time the relationship was terminated, he could have, at a minimum, informed Ms. Varner of the potential injury she might suffer if she did not allow him to continue working to secure the benefits.

The record supports the finding of the

Hearing Board. Fisher had never handled a case involving a federal pension before. During the nine months between the time he was retained by Ms. Varner and his termination, Fisher never contacted the OPM, did not review the attorney's handbook published by the OPM, did not consult the OPM website, and did not consult with experts in the field of federal benefits. After the trial court issued the decree providing Ms. Varner should receive benefits from Mr. Varner's OPM account, Fisher failed to mail the decree to the OPM or instruct another party to do so.

Thomas Hefty, an expert witness in the area of division and transfer of retirement benefits upon dissolution of marriage, testified division of retirement benefits is a specialized practice that domestic relations attorneys often refer to specialists. He stated the OPM publishes a handbook and website to provide information to attorneys on the proper handling of federal pensions. Mr. Hefly testified that it is not enough for an attorney simply to obtain a decree awarding benefits to the spouse, the attorney must provide the OPM with the order.

Therefore, evidence in the record supports the Hearing Board's finding that Fisher did not provide competent representation to Ms. Varner because he failed to take action which would have aided him in securing the survivor

benefits. Accordingly, the Hearing Board's finding was not clearly erroneous, and we affirm the Board on this ground.

C. Colo. RPC 1.3

Fisher argues the Hearing Board's determination that he neglected a legal matter in violation of Colo. RPC 1.3 must be reversed because it is not supported by clear and convincing evidence. The Hearing Board found Fisher violated this rule because he did not take any steps to secure the OPM benefits-one of Ms. Varner's primary objectives for the representation. Fisher argues he could not have neglected the matter because Ms. Varner ultimately received the benefits. We disagree with Fisher's conclusory reasoning.

Colo. RPC 1.3 requires a "lawyer to act with reasonable diligence and promptness in representing a client. A lawyer shall not neglect a legal matter entrusted to that lawyer." Lawyers retained on particular matters should pursue those matters "on behalf of a client despite opposition, obstruction[,] or personal inconvenience to the lawyer." Colo. RPC 1.3 cmt. Unless the professional relationship is terminated by the client, "a lawyer should carry through to conclusion all matters undertaken

for a client." *Id.*

Fisher's argument that he could not have neglected the matter because Ms. Varner ultimately received the benefits is unpersuasive. The Hearing Board found that, while Fisher won a judgment from the trial court in the dissolution of marriage action awarding Ms. Varner these benefits, Fisher "did not take the next steps necessary to secure them." The Board considered Ms. Varner's unwillingness to return telephone calls or meet with Fisher following the permanent orders hearing. However, the Board determined that, while Ms. Varner's actions made it difficult for Fisher to communicate with her, they did not ameliorate his duty not to neglect legal matters entrusted to him.

The fact that Ms. Varner ultimately received the benefits to which she was entitled does not mean that Fisher promptly and diligently performed his duties. In fact, the record supports the Board's conclusion that, during the time Fisher represented Ms. Varner, he did not act with promptness or diligence in securing the OPM benefits. In the three months between the trial court's order that Ms. Varner receive one half of Mr. Varner's OPM benefits and Fisher's termination. Fisher took no steps to secure the benefits in Ms. Varner's name. After obtaining the decree from the trial court, Fisher did not mail the order to the OPM or consult with Ms.

Varner regarding the need to submit an order to the OPM for processing. Nor did he consult with opposing counsel regarding the division of the survivor benefits or request that opposing counsel make arrangements with the OPM for the benefit division.

Therefore, it was not clearly erroneous for the Hearing Board to find that Fisher failed to take prompt measures to secure Ms. Varner's rights in Mr. Varner's OPM. Accordingly, we affirm the Board's finding Fisher neglected a legal matter.

D. Colo. RPC 1.8(a)

On summary judgment, the Presiding Disciplinary Judge ("PDJ") found Fisher obtained an interest adverse to his client's without complying with the requirements of Rule 1.8(a) when he took the deed of trust in the Varner residence. Fisher argues this determination was legal error which we should review de novo. However, we view this as a challenge to the PDJ's factual finding, and will reverse only if the decision was clearly erroneous.

> Colo. RPC 1.8(a) provides that an attorney shall not enter into a business transaction with a client or knowingly acquire an ownership,

possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and writing to the client in a manner reasonably understood by the client;

(2) the client is informed that use of counsel may be advisable and is given a opportunity to seek the advice of such counsel in the transaction; and

(3) the client consents in writing thereto.

Therefore, an attorney may obtain an interest adverse to a client's, but the transaction must be fair to the client, the client must be advised of the desirability of obtaining independent counsel and given the opportunity to do so, and must consent to the transaction in writing.(fn2)

Fisher argues it was not improper to take the deed of trust because it was not "adverse" to Ms. Varner's interests. He states there was no adversity because he and Ms.

Varner's objectives regarding the residence were aligned and his interest did not negatively impact Ms. Varner. He therefore asserts the Rule requiring consent and independent counsel when an attorney and a client's interests are adverse is inapplicable. We disagree.

In a Formal Ethics Opinion, the American Bar Association ("ABA") takes the position it is not per se improper for an attorney to secure a fee through taking a security interest; however, when doing so, the attorney must abide by the mandates of Rule 1.8(a). ABA Formal Opinion 02-427. A similar Colorado Bar Association Ethics Opinion states if a lawyer takes a security interest in a client's property for payment of fees, he must comply with Colo. RPC 1.8(a). CBA Ethics Opinion 110: Assertion of Attorney's Charging Lien/Security Interest in Property, Mod. May 19, 2001. A deed of trust is a security interest. *Herstam v. Bd. of Dir. Silvercreek Water and Sanitation Dist.*, 895 P.2d 1131, 1138 (Colo.App. 1995); § 38-35-117, C.R.S. (2008) ("Mortgages, deeds of trust, or other instruments intended to secure the payment of an obligation shall be deemed a lien.").

Black's Law Dictionary defines "adverse" as "against or opposed to," and having a "contrary interest, concern, or position." *Black's Law Dictionary* 252 (8th ed. 2004). Here, Fisher entered into a prohibited transaction with Ms. Varner when he acquired an ownership interest in the residence. In the context of Rule 1.8(a), an

attorney and a client's interests are adverse if their pecuniary interests are opposed to one another. The simple fact that a client and an attorney's interests are opposed establishes adversity for purposes of Rule 1.8(a). It is therefore not necessary to inquire into whether that adversity negatively impacts the client because the protective measures outlined by Rule 1.8(a) must be followed any time a lawyer's pecuniary interest are opposed to the client's.(fn3)

Accordingly, in the context of Rule 1.8(a), Fisher's argument that there was no adversity between himself and Ms. Varner is flawed. Here, by acquiring the promissory note and deed of trust, Fisher streamlined his ability to collect his fees and reduced the amount of equity Ms. Varner had in the property. Therefore, Fisher's pecuniary interest in the residence was opposed to Ms. Varner's, and their interests were adverse. It is of no consequence that Ms. Varner was not ultimately negatively impacted because of this adversity.

Because Fisher entered into a business transaction with Ms. Varner in which their pecuniary interests were adverse, he should have complied with Rule 1.8(a)'s independent counsel and consent requirements. Therefore, the Hearing Board's determination that Fisher violated Rule 1.8(a) is not clearly erroneous, and we affirm the Board.

E. Colo. RPC 1.8(j)

On summary judgment, the PDJ also determined Fisher violated Colo. RPC 1.8(j),(fn4) which prohibits attorneys from obtaining proprietary interests in the subject matter of the representation. when he took the deed of trust in the Varner residence. Fisher argues this finding was legal error; we view this claim as a challenge to the sufficiency of the evidence to support the PDJ's conclusion, and we will reverse only if we find the decision was clearly erroneous.

Colo. RPC 1.8(j) disallows a lawyer from acquiring "a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client." However, the lawyer may acquire a "lien granted by

law" to secure the lawyer's fees and contract with a client for a reasonable contingent fee in a civil case. *Id.* In amended Rule 1.8r(j), now appearing as Rule 1.8(i), the language was changed to allow a lawyer to acquire a lien "authorized by law." We view this change in language as not affecting the substance of the rule.

Fisher argues he did not violate the rule prohibiting attorneys from acquiring proprietary

interests in the subject matter of the representation because a deed of trust is a "lien granted by law to secure a lawyer's fees." He states the 2008 revision to Rule 1.8(j) makes clear that deeds of trust are not prohibited under this rule. However, Fisher is again mistaken.

The exception for "liens granted by law" refers to an attorney's retaining or charging lien, authorized by sections 12-5-119, -120, C.R.S. (2008). *See People v. Smith,* 830 P.2d 1003, 1005 (Colo.1992). Fisher argues the deed of trust qualifies as a "lien granted by law" because it operated in the same manner as an attorney's charging lien, and the revised rule includes deeds of trust in the exception.

Attorney's charging liens are statutory creations under which attorneys have liens on money, property, claims, or judgments they have obtained or assisted in obtaining. § 12-5-119. The lien begins to accrue from the moment of commencement of services. *In re Marriage of Berkland,* 762 P.2d 779 (Colo.App.1988). An attorney's charging lien places third parties on notice that the attorney has an interest in the funds subject to the lien. *Id.* In order to collect under the lien, the attorney must reduce it to a judgment.

The comments to the revised version of the rule

state "the law of each jurisdiction" determines which "liens authorized by law" are excepted from the rule's prohibition on attorneys acquiring proprietary interests in the subject matter of the representation. Colo. RPC 1.8 cmt. The comment suggests "these may include liens granted by statute, liens originating in common law, and liens acquired by contract with the client." *Id.* Fisher argues that, because the comments specifically allow liens originating in common law and those acquired by contract, his deed of trust was proper. However, the comments state the law of each jurisdiction determines what liens are excepted from the rule. In Colorado, attorney's charging liens are the only "liens authorized by law," and as such, they are the only liens excepted from the prohibition against attorneys obtaining proprietary interests in the subject matter of the litigation.

In contrast to attorney's charging liens, the promissory note and deed of trust were not authorized by law. While attorneys charging liens arise by operation of law, promissory notes and deeds of trust do not--they arise when granted by an individual. The deed of trust allowed Fisher to collect on his promissory note immediately without reducing his claim to a judgment. While attorney's charging liens roughly accomplish the same purpose Fisher pursued when he had Ms. Varner sign the deed of trust--security for the payment of fees--Fisher cannot merely substitute one for the other.

Attorney's charging liens are specifically provided for by statute and are excepted from the prohibition on attorneys obtaining proprietary interests in the subject matter of the representation. Deeds of trust are not. Therefore, when Fisher secured the promissory note with the deed of trust in the Varner residence he acquired a proprietary interest in the subject matter of the litigation in violation of the Rules of Professional Conduct. Accordingly, we affirm the PDJ because the determination Fisher violated Rule 1.8(j) was not clearly erroneous.

F. Requirements of 1.8(a) and (j) unknown to Fisher

Fisher argues that even if his actions violated Rules 1.8(a) and (j), he cannot now be punished because he did not know the conduct was wrong at the time it was committed. This argument presents a legal question, and we therefore apply a de novo standard of review.

As discussed above, there is ample legal authority in Colorado establishing that attorneys must abide by Rules 1.8(a) and (j) when taking a security interest in the subject matter

of representation. In Colorado, the only "liens granted by law"(fn5) excepted from the prohibition

on lawyers acquiring proprietary interests in the subject matter of the representation are attorney's liens. Accordingly, Rule 1.8(j) applies to deeds of trust, and Fisher violated it when he took the deed of trust in the Varner residence. Similarly, when an attorney takes a security interest in his client's property, this is a business transaction and he must comply with the consent and independent counsel requirements of Rule 1.8(a).

All Colorado attorneys are presumed to be aware of the Rules of Professional Conduct and their impact. *See In re Attorney C.,* 47 P.3d 1167, 1173 (Colo.2002). An attorney's "awareness that his conduct will violate an ethical proscription is not itself material." *In re Attorney D., 57* P.3d 395, 400 (Colo.2002). Therefore, Fisher's conduct warrants punishment whether or not he knew the conduct was improper. Accordingly, we decline to set aside the PDJ's determination that Fisher violated Colo. RPC 1.8(a) and (j).

G. Timeframe for Issuance of Opinion

Fisher argues the Hearing Board lost jurisdiction over the matter because it issued the Opinion and Order Imposing Sanctions 96 days after the hearing. This is a matter of law which we review de novo.

C.R.C.P. 251.19 provides that "within sixty days after the hearing" the Hearing Board "shall prepare an order setting forth its findings of facts and its decision." However, nothing in this rule, or any other rule, states the Hearing Board loses

jurisdiction to rule on a matter if the opinion is not issued within sixty days after the hearing. In light of C.R.C.P. 1(a), which states the Rules of Civil Procedure "shall be liberally construed to secure the just, speedy and inexpensive determination of every action," we hold the failure to issue a decision within 60 days does not result in the Hearing Board losing jurisdiction over the matter.

We do not suggest there should never be consequences for the Hearing Board's failure to issue a timely decision, however we find the 60 day time period to be largely aspirational. In determining whether consequences should result if the Board fails to render a timely decision, we will consider the extent of the delay, the reasons for the delay, and any prejudice that occurred as a result of the delay.

Here, while the decision was issued 96 days after the hearing, Fisher can point to no prejudice that occurred as a result of the delay. The Hearing Board did not state the reasons for the delay, but we note this was a case involving numerous charges and a significant amount of evidence. Because Fisher was not prejudiced in any way, and Fisher's proposed remedy of remanding the case and trying the matter anew would merely prolong the case at significant cost for all parties, we decline to impose any consequences for the Board's failure to issue the opinion within 60 days. Accordingly, we find no action is required for this minor violation of the 60 day requirement; however, the Hearing Board shall make every attempt to comply with this timeframe in the

future.

H. Due Process

Fisher argues it was error for the Hearing Board to deny his motion for a new trial based on Regulation Counsel's failure to disclose their expert's assessment of the case. Regulation Counsel consulted with an expert in the field of OPM benefits when preparing for the hearing. Fisher argues this consultation resulted in Regulation Counsel's expert opining that Fisher did not violate the rules requiring competent representation and prohibiting neglect of a legal matter. Fisher asserts this is exculpatory evidence which must be disclosed to him because attorney discipline proceedings are "of a quasi-criminal nature." *See In re Ruffalo,* 390 U.S. 544, 551, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). Fisher argues because of the "quasi-criminal nature" of discipline proceedings, due process protections afforded to criminal defendants must be provided

to attorneys in discipline proceedings. We review this claim de novo.

The simple fact that attorney discipline proceedings are quasi-criminal in nature does not mean the full panoply of criminal protections apply, or that the Rules of Criminal Procedure

should govern disciplinary proceedings. On the contrary, disciplinary proceedings are conducted pursuant to the Colorado Rules of Civil Procedure. C.R.C.P. 251.18(d). In contrast to criminal matters, the Rules of Civil Procedure allow litigants to work with consulting experts without disclosing the identity or opinions of that expert if she is not called as a witness. *Phillips v. Dist. Court,* 194 Colo. 455, 573 P.2d 553 (1978); C.R.C.P. 26(b)(4)(B) (stating a party may "discover facts known or opinions held" by an expert retained by opposing counsel "who is not expected to be called as a witness at trial only as provided by C.R.C.P. 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means").

Here, Regulation Counsel's expert did not testify, and there is no indication his opinions were used in any way. Accordingly, in this instance, the Rules of Civil Procedure adequately protect Fisher's due process rights.

I. Double Jeopardy

In a similar vein as the due process argument, Fisher argues Regulation Counsel's appeal of the Hearing Board's findings that Fisher did not violate Colo. RPC 1.7(b), 3.3(a), 3.4(c), and 8.4(c)

violates the constitutional prohibition against double jeopardy. We review this matter de novo.

We reject Fisher's argument that double jeopardy applies to regulatory discipline. In fact, this court has specifically held double jeopardy concepts do not apply to attorney discipline proceedings. *People v. Marmon,* 903 P.2d 651, 654-55 (Colo.1995). However, while appeals by Regulation Counsel of Hearing Board determinations that an attorney did not violate the Rules of Professional conduct do not contravene constitutional rights, they are not advisable in light of the very difficult standard of review we apply to such appeals. *See In the Matter of Rosen,* 198 P.3d 116, 119 (Colo.2008).

IV. Regulation Counsel's Appeal

A. Standard of Review

While we recognize we have plenary power over attorney disciplinary matters, we have nonetheless established standards of review which we apply when reviewing decisions of the Hearing Board. The standard of review for decisions of the Hearing Board finding no violation of a rule differs subtly from the standard of review for findings of a violation because of the nature of the Board's decision.

When the Hearing Board determines a violation occurred, it applies a clear and convincing evidence standard. Because this is a finding of fact, we will disturb this finding only if it was clearly erroneous or not supported by substantial evidence in the record. *In re Haines,* 177 P.3d at 1244. However, if the Hearing Board does not find a violation, the clearly erroneous standard for factual findings is not applicable. *Rosen,* 198 P.3d at 119. When the Board returns a finding of no violation, it does not make a factual finding that we can review; we have described the determination of no violation as the absence of a factual finding. *Id.* A determination that no violation occurred is a finding that the evidence is insufficient to convince the Board of a violation by a standard of clear and convincing evidence. We do not suggest that there will always be a particular piece of evidence the absence of which the Board can point to in order to demonstrate insufficient evidence. Rather, the insufficiency may be a general shortcoming in the persuasiveness of the evidence as a whole.

The advantage of having a trier of fact hear testimony is that she is able to evaluate the credibility of the witnesses, detect nuances in testimony, and determine the overall persuasiveness of the evidence. Therefore, a hearing officer may find it difficult to explain a failure to find a violation by the standard of clear and convincing evidence, particularly when it is based on a general uncertainty about the evidence as a whole. Further, the Hearing Board's three panel members may have been unconvinced for different reasons. Recognition that reasonable people may view

evidence differently is one of the reasons justifying the three-person panel.

Here, the Hearing Board did not make an extraordinary effort to explain what failed to convince them that Fisher violated Rules 1.7, 3.3, 3.4, and 8.4. While a clear explanation of the short-comings of the evidence would facilitate our review, we will not require the Board to make findings as to why it is unconvinced of a violation. To do so might require each member of the Board to attempt to explain possibly separate dissatisfaction with the degree to which the evidence is persuasive. In the absence of a detailed explanation of the shortcomings of the evidence, we may look to the possible reasons a Board might be unconvinced. If we can articulate a reason the Board could have been unconvinced

of a violation, whether or not it represents the Board's actual reasoning, we will affirm because, based on this reason, we cannot say that no reasonable fact finder could be unconvinced of a violation by a standard of clear and convincing evidence. Accordingly, we affirm the Hearing Board if we find from review of our record that a reasonable person could find that any one of many possible views of the evidence does not meet the clear and convincing standard. Therefore, in the absence of legal error, we will only overturn the Hearing Board's failure to find a violation if no reasonable fact finder could be unconvinced of a violation by the standard of clear and convincing evidence. *Rosen,* 198 P.3d at 119.

Appeals from the Hearing Board's finding of no violation should be taken sparingly, as it is unusually difficult to show error. Rather than creatively explore the many possible reasons for the panel's decision, it is sufficient that we simply conclude the panel could reasonably reach such a conclusion. If we choose to discuss how the panel may have found the evidence less than convincing, we will affirm the Hearing Board if we conclude a reasonable explanation exists justifying the Board's finding of no violation. Further, we recognize that our discussion may not even reflect the panel's actual dissatisfaction with the evidence.

Therefore, we will overturn the Hearing Board's determination a violation did not occur only if we cannot find any reasonable explanation

for the Board's determination, and conclude that no reasonable fact finder could be unconvinced of a violation by a standard of clear and convincing evidence.

B. 1.7(b)

The Hearing Board determined Fisher did not violate the rule requiring representation not be limited by a lawyer's own interests as alleged in the first complaint. Regulation Counsel argues it was legal error for the Board to find no violation because, by representing Ms. Varner in the sale of the marital residence, Fisher also advanced his own claims against the proceeds of the sale. However, this is not a claim of legal error, and we will reverse the Hearing Board only if we find that no reasonable fact finder could be unconvinced of a violation of Rule 1.7(b) by clear and convincing evidence. *Id.*

Rule 1.7(b) states:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's . . . own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. .

Therefore, the rule requires a lawyer not represent a client if that representation may be materially limited by the attorney's own interests unless the attorney reasonably believes the representation will not be adversely affected and the client consents after consultation. The Hearing Board determined no conflict existed and Fisher therefore did not have to consult with Ms. Varner or obtain her consent. Regulation Counsel argues Fisher's deed of trust gave him a direct financial interest in the sale of the residence, and, as such, he was not in a position to explore alternatives to the sale of the residence or maximize Ms. Varner's return on the sale.

The comments to the rule state a lawyer's own interests should not be permitted "to have adverse affect on representation of a

client." Colo. RPC 1.7 cmt. In its comments to Model Rule 1.7, largely the same as Colo. RPC 1.7(b), the ABA states "the mere possibility of . . . harm does not itself require disclosure and consent." Model Rule of Professional Conduct 1.7, cmt. 8. Rather, the ABA urges the focus for determining whether a conflict exists is "the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's

independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." *Id.* Therefore, the focus of a Rule 1.7(b) inquiry is on the effect the attorney's interest may have on the client.(fn6)

Here, the judge in the Varner's dissolution of marriage case previously ordered the marital residence sold, and ordered Ms. Varner pay her own attorney fees. The judge knew Ms. Varner's only asset, aside from the OPM benefits, was her equity in the marital residence. Two months after the judge ordered the home sold, there was a contract for sale on the house for the full asking price. From the record, it appears Fisher had no role in determining the asking price. There is no indication Fisher's interest in the marital residence affected the sale price, the speed of the sale, or the decision of the trial court to order the sale of the home.

The Hearing Board may have found that Fisher's interest would not negatively affect Ms. Varner. In fact, Ms. Varner and Fisher's interests were aligned with regard to the sale of the residence. The court ordered the sale, and, as Ms. Varner's attorney, Fisher was obliged to complete the sale. Both Fisher and Ms. Varner hoped to accomplish a swift sale of the property and, once an offer was tendered at the asking price, to complete the sale. Fisher

sought this outcome in order to ensure that his attorney fees were paid, while Ms. Varner sought this outcome, as required by court order, to discharge debts she owed. Accordingly, because the Board may have concluded Fisher and Ms. Varner's interests were not adverse to one another, it cannot be said that no reasonable fact finder could be unconvinced of a Rule 1.7(b) violation by clear and convincing evidence.

Regulation Counsel further argues Fisher's continued work aimed at ensuring the completion of the sale of the Varner residence after he received Ms. Varner's order to stop work also violated Rule 1.7(b). Regulation Counsel asserts that, because of his desire to see the sale completed, Fisher continued work on the sale, disregarding Ms. Varner's request. The Hearing Board did not make factual findings regarding this claim. However, given the relative ambiguity of the stop work order, Ms. Varner's refusal to return communications to Fisher, and Fisher's subjective understanding that the stop work order only applied to new matters, we will not overturn the Board's determination that Fisher did not violate Rule 1.7(b). Because we can articulate several reasonable explanations as to why the Hearing Board may have been unconvinced of a violation by the standard of clear and convincing evidence, we conclude a reasonable fact finder could be unconvinced Fisher violated Rule 1.7(b) by clear and

convincing evidence.

Accordingly, we affirm the Hearing Board's determination that Fisher did not violate Colo. RPC 1.7(b).

C. Colo. RPC 3.3(a)(1) and (a)(4)

Regulation Counsel argues Fisher violated the rules prohibiting false statements of material fact to tribunals(fn7) when he

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failed to update Ms. Varner's financial affidavit showing his interest in the marital residence. Colo. RPC 3.3(a)(1) states "a lawyer shall not knowingly make a false statement of material fact or law to a tribunal." Under 3.3(a)(1), failure to disclose material information to a tribunal is the equivalent of making a false statement of material fact. Model Rule of Professional Conduct 3.3, cmt. 3; *In re Cardwell,* 50 P.3d 897 (Colo.2002) (holding when client pled guilty to driving under the influence of alcohol, criminal defense attorney had obligation to inform the court client committed perjury when he denied previous alcohol-related convictions). Colo. RPC 3.3(a)(4) disallows an attorney from offering evidence "the lawyer knows to be false." "If a lawyer has offered

material evidence and later learns that the evidence is false, the lawyer shall take reasonable remedial measures." Colo. RPC 3.3(a)(4).

Therefore, the focus of a Rule 3.3(a)(1) inquiry is not on the falsity of the statement, but on the materiality of the statement. Similarly, when a lawyer learns that previously submitted evidence is false, under Rule 3.3(a)(4), he must only correct it if the evidence was material. Here, the affidavit provided to the trial court showing security interests in the Varner residence was false in that it was not amended to include Fisher's deed of trust once he obtained it from Ms. Varner. However, the focus of the Board's inquiry was on the materiality of the failure to amend the affidavit.

The ABA comments to Model Rule of Professional Conduct 4.1, requiring lawyers not make false statements of material fact in transactions with others, provides a statement is material if it could have influenced the hearer. Model Rule of Professional Conduct 4.1, cmt. 1. This definition squares with this court's holding in *People v. Small,* 962 P.2d 258 (Colo.1998), where we found an attorney violated Colo. RPC 3.3(a)(1) even though his misrepresentation to a trial court did not affect the outcome of the case. Accordingly, the concept of materiality encompassed in Colo. RPC 3.3(a)(1) is not directed by the outcome of a particular matter, but rather whether there is potential that the information *could* influence a determination as to

that matter.

Under the Colorado attorney's lien statute, an attorney has a lien on money, property, claims, or judgment which she aids in obtaining. § 12-5-119. The lien arises by operation of law as soon as the attorney commences representation. *Id.* Therefore, Fisher already had an interest, represented by an attorney's lien, in Ms. Varner's equity in the home at the time the trial judge issued the permanent orders.(fn8) The fact of Fisher's interest in Ms. Varner's equity was surely material to the trial court when dividing Mr. and Ms. Varner's equity and determining maintenance. However, the trial court was aware Fisher had an interest in Ms. Varner's equity in the marital residence, whether secured by the deed of trust or an attorney's lien. Because the trial court was aware of this interest, it is possible the Hearing Board could have determined Fisher's deed of trust in the marital residence was not material information. Accordingly, because we can articulate at least one reasonable explanation as to why the Board may have been unconvinced of violations of Rule 3.3(a)(1) and (a)(4), we cannot find that no reasonable fact finder could be unconvinced of such violations by a clear and convincing evidence standard. We therefore affirm the trial court's determination Fisher did not violate Rule 3.3(a)(1) and (a)(4).

Regulation Counsel argues Fisher's failure to update Ms. Varner's affidavit after

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he obtained the deed of trust also violated the rule prohibiting attorneys from disobeying the rules of a tribunal. The rule provides "a lawyer shall not knowingly disobey an obligation under the rules of a tribunal. . . ." Regulation Counsel argues Fisher violated this rule because, under C.R.C.P. 26.2 as it existed in 2003, fn9) an attorney is "under a duty to supplement its disclosures . . . when [the attorney] learns that in some material respect the information disclosed is incomplete or incorrect." As discussed above, it is possible the Hearing Board found that Fisher's failure to correct the affidavit did not materially change the evidence before the trial court. Accordingly we will not overturn the decision of the Hearing Board on these grounds because we cannot find that no reasonable fact finder could be unconvinced of a Rule 3.4(c) violation by a standard of clear and convincing evidence.

Regulation Counsel also asserts Fisher violated Rule 3.4(c) by collecting $350 more than authorized by the trial court order enforcing his attorney's lien.

Fisher and Ms. Varner entered into a fee agreement at the commencement of representation which allowed Fisher to charge a $350 collection fee from Ms. Varner. When Fisher enforced his attorney's lien, the trial court order authorized him to retain an amount of $3,581.63 from his client trust account. In addition to the $3,581.63 authorized by the trial court, Fisher retained $350 as a collection fee.

The evidence establishes that the trial court order did not prohibit the retention of a collection fee, and Ms. Varner agreed to pay this sum, representing charges accruing from a purpose distinct from the attorney's lien, and thus not included within the lien amount. It is therefore possible the Hearing Board found the retention of the collection fee was not contrary to the trial court's order. Because we can articulate one reasonable explanation as to how the Hearing Board could have concluded there was not clear and convincing evidence establishing a Rule 3.4(c) violation, we will not reverse the decision of the Hearing Board.

E. Colo. RPC 8.4(c)

Regulation Counsel argues the Hearing Board erred in not finding that Fisher violated the rule prohibiting lawyers from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." This court has stated that in order for a lawyer to be found "to have engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, it must be shown

that the lawyer possessed a culpable mental state greater than simple negligence. . . . [W]e conclude that the element of scienter must be shown." *People v. Rader*, 822 P.2d 950, 953 (Colo.1992) (referring to DR 1-102(A)(4), the precursor to Colo. RPC 8.4(c)). The element of scienter is shown when "it is established that the attorney deliberately closed his eyes to facts he had a duty to see . . . or recklessly stated as facts things of which he was ignorant." *Id.* (citing *United States v. Benjamin*, 328 F.2d 854, 862 (2nd Cir.1964)). Accordingly, a mental state of at least recklessness is required for an 8.4(c) violation. *See People v. North*, 964 P.2d 510, 513 (Colo. 1998).

Here, it is possible the Hearing Board found Fisher did not have the requisite mental state when he failed to amend Ms. Varner's financial affidavit. For example, the Board could have believed Fisher's testimony that he did not think he was obligated to include his deed of trust in the affidavit, and this misunderstanding of the disclosure rules established only a mental state of negligence. Accordingly, there is sufficient evidence in the record for us to articulate a reasonable explanation as to how the Board may have been unconvinced of a violation. Therefore, a reasonable fact finder could be unconvinced of an 8.4(c) violation by a clear and convincing evidence standard, and we affirm the Hearing Board on this ground.

V. Sufficiency of Discipline

Under C.R.C.P. 251.27(b), we affirm the discipline imposed by the Hearing Board unless it 1) bears no relation to the conduct; 2)

is manifestly excessive or insufficient in relation to the needs of the public; or 3) is otherwise unreasonable.

Regulation Counsel argues the discipline imposed by the Hearing Board is unreasonable and insufficient in relation to the needs of the public. However, we disagree. The Hearing Board made detailed findings pursuant to the ABA Standards for Imposing Lawyer Sanctions. The ABA Standards instruct a disciplining authority to consider the duty violated by the attorney, the attorney's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating and mitigating factors.

The Board found Fisher violated important duties he owed to Ms. Varner. The Board also found Fisher was aware of his conduct when he failed to pursue Ms. Varner's interest in the OPM benefits, and acted knowingly when he obtained the deed of trust. The Board considered the potential for injury to Ms. Varner to be serious; however, it stated it was mindful that Ms. Varner's physical and mental condition made it difficult for Fisher to complete Ms. Varner's objectives following permanent orders. The Board found three mitigating factors: the absence of prior discipline, cooperative attitude in the

proceedings, and Fisher's patience in dealing with the delay caused by Regulation Counsel's decision to file a second complaint. The Board found four aggravating factors: selfish motive, refusal to acknowledge the wrongful nature of the conduct, the vulnerability of the victim, and Fisher's substantial experience in the practice of law.

The Hearing Board properly considered the ABA standards and appropriately applied them to the facts in this case. The sanctions imposed by the Hearing Board-suspension from the practice of law in the State of Colorado for six months stayed upon completion of a two-year probationary period-adequately protect the public and were not unreasonable or insufficient. Accordingly, we affirm the Hearing Board's disciplinary order.

VI. Conclusion

For the foregoing reasons, we affirm the decision of the Hearing Board on all grounds. Justice EID, concurring in part and dissenting in part.

I join Section III of the majority's opinion affirming the Hearing Board's decision that Fisher

violated several Rules of Professional Conduct. I dissent, however, from Section IV of the opinion, which denies Regulation Counsel's cross-appeal and affirms the Board's determination that Fisher did not violate certain other Rules of Professional Conduct. The majority acknowledges that the Board provided little guidance as to why it found no violation with regard to these allegations. Maj. op. at 1199. Yet it affirms the Board's decision based on the fact that it is able to "articulate a reason the Board could have been unconvinced of a violation." *Id.* at 1200 (emphasis added). In my view, we should not affirm a "no violation" determination by the Board simply because we can articulate a possible justification for that result. Instead, when the Board's rationale is sufficiently unclear so as to hinder our review of its "no violation" determination, we should remand the case to the Board.

Under C.R.C.P. 251.27(b), we review the Board's factual findings under a standard of clear error, and its legal conclusions de novo. The problem in this case is that with regard to its determination that Fisher did not violate Rules 1.7(b), 3.3(a), 3.4(c), and 8.4(c), the Board did not set forth its rationale to a sufficient degree to enable us to apply the standard of review articulated by Rule 251.27(b). In other words, it is impossible to review the Board's determinations of "no violation" in this case because there are no factual findings or rationale to review. The majority recognizes this problem, noting that "[w]hen the Board returns a finding of no violation, it does not make a factual finding that we can

review." Maj. op. at 1199.

The majority's solution to this problem is to treat the Board's finding of "no violation" as the equivalent of a factfinder's verdict of no liability in a civil case. *See id.* at 1200 (relying on *In the Matter of Rosen,* 198 P.3d 116, 119 (Colo.2008), which considered the regulation counsel's challenge to a no violation finding according to *"the standard required*

for a motion for directed verdict or motion for judgment notwithstanding the verdict" under the Rules of Civil Procedure (emphasis added). The standard for granting either a motion for a directed verdict or a motion for judgment notwithstanding the verdict is essentially the same: the verdict must be preserved unless "no reasonable person could reach the same conclusion as the jury." *Hall v. Frankel,* 190 P.3d 852, 862 (Colo.App.2008). Drawing on this standard, the majority holds that the Board's determination of no violation will be affirmed as long as "we can articulate a reason the Board could have been unconvinced of a violation, whether or not it represents the Board's actual reasoning." Maj. op. at 1200. In other words, if the majority can come up with a "possible reason[ ]" for the Board's determination it will affirm the Board, because a "reasonable person" could have come to

that conclusion. *Id.*

The majority's assumption that the Hearing Board's determination of no violation should be analogized to a civil verdict of no liability has remained largely unexamined by this court. *See Rosen,* 198 P.3d at 119 (adopting the analogy without discussion); maj. op. at 1199-1200 (relying on *Rosen).* In my view, the analogy is flawed. We require no more of a civil jury than a verdict of "no liability" or, in certain cases, short answers to specific questions. *See generally* C)I-Civ. 4th. But the Hearing Board does not return a verdict, as the majority suggests. Maj. op. at 1199-1200. Rather, the Board "shall prepare *an opinion* setting forth *its findings of fact* and *its decision."* C.R.C.P. 251.19(a) (emphasis added). At the very least, the Board's opinion must adequately set forth the grounds of decision so that we can review it under the standards set forth by C.R.C.P. 251.27(b).

Unlike the majority, I would not establish a dual system of review depending upon whether the Board found or did not find a violation. Our rules do not outline two different standards of review. *See* C.R.C.P. 251.19(a) and 251.27(b) (making no distinction between appeals of determinations of violations and determinations of no violations). The majority posits that it might be difficult for the Board to articulate why a violation was not proven, or that the panel members may be unconvinced that a violation

occurred for different reasons. Maj. op. at 1199. Yet in my view, these concerns would apply equally to the Board's determination that a violation occurred.

The majority describes the difference between the review standards it articulates as "subtl[e]." *Id,* at 1199. To be sure, reviewing factual findings for clear error where we have the Board's rationale, and determining whether a possible explanation can be found where we do not, are both deferential standards. What differs is the *quality* of our review. In the former instance, we have the benefit of the Board's explanation of how it viewed the evidence, how it applied the law to that evidence, and how it arrived at the result it did. In the latter, we are simply searching for a rational explanation for its result--which may or may not have been the grounds for its determination. Even the majority acknowledges that "a clear explanation of the short-comings of the evidence [leading the Board to find no violation] would facilitate our review." *Id.* at 1200. I see no reason why we would systematically hinder our review of no violation determinations.

The majority compounds this error by admonishing Regulation Counsel that their appeals should be few and far between. According to the majority, "[a]ppeals from the

Hearing Board's finding of no violation should be taken sparingly, as it is unusually difficult to show error." *Id.* at 1200. Demonstrating that the Board's factual findings are clearly erroneous in the case of a violation determination may also be "unusually difficult," but we have never suggested that appeals of violation determinations should not be brought. Again, I see no reason for us to discourage one side or the other from appealing in the attorney regulation context. Our duty is to ensure that the public is served by ethical and competent attorneys. C.R.C.P. 251.1(a). In my view, we can best discharge that duty by applying the same standards to all attorney regulation appeals.

The facts of this case illustrate the pitfalls of the majority's dual standard. Regulation Counsel alleged that Fisher violated Rule

1.7(b), which prevents an attorney from representing a client if "the representation . . . may be materially limited by .the lawyer's own interests," Colo. RPC 1.7(b) (2007), unless the attorney "(1) reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation." Colo.

RPC 1.7(b)(1)-(2) (2007). Regulation Counsel argued that, in taking an interest in the house to secure his fees, Fisher had a conflict of interest that would materially limit his representation of Ms. Varner. The Hearing Board concluded that "evidence of a conflict is not clear and convincing." Hearing Bd. decision at 10. Leading up to this conclusion, the Board stated that Fisher "had a right to collect his attorney's fees in the domestic court" and to "assert the lien in the action in which [he] performed his services." *Id.; see also id.* (noting again that Fisher "had a right to collect his fees"). The Board also stated that "there is no evidence to suggest [Fisher] did not earn the fees he collected." Id. (emphasis added). The Board then concluded that the evidence of a conflict was not clear and convincing. *Id.*

When read as a whole, the Board's opinion suggests that its no violation determination was based on a mistake of law-namely, that there can be no conflict of interest as long as an attorney had earned and had a right to collect the fees. The question posed by Rule 1.7(b), however, is not whether the fees were earned and could be collected, but rather whether the deed of trust on the residence securing those fees posed a risk that Fisher's representation of Ms. Varner "may be materially limited." *See* Colo. RPC 1.7(b) (2007). By positing a scenario under which the Board could have found no material limitation, maj. op. at 1201,(fnl) the majority affirms a determination of no violation that the Board might not have reached had it not been harboring under a mistake of law. In my view, we should

not affirm the Board's determination under these circumstances, but rather remand the case.

I agree with the majority that we should defer to the Board's determinations. As the majority notes, "The advantage of having a trier of fact hear testimony is that she is able to evaluate the credibility of the witnesses, detect nuances in testimony, and determine the overall persuasiveness of the evidence." *Id.* at 1199. But that is precisely why the Board should set forth its analysis of the evidence that led it to the conclusion it reached, as opposed to this court coming up with a possible explanation for its conclusion. Because the majority affirms the Board's no violation determinations rather than remanding the case, I respectfully dissent from its opinion.

I am authorized to state that Chief Justice MULLARKEY and Justice RICE join in this dissent.

Footnotes:

FN1. The Colorado Rules of Professional Conduct underwent substantial revision in 2008. All references in this opinion to the Colorado Rules of Professional Conduct refer to the Rules as they existed in 2007.

FN2. The 2008 revision of Rule 1.8(a) adds the additional requirements that the client be

inquiry focuses on the affect the adversity has on the attorney-client relationship, not merely on the fact that adversity exists. Therefore, if adversity exists between an attorney and a client's interests, Rule 1.8(a) is violated, regardless of whether the attorney reasonably believes the adversity will negatively affect his representation of the client. We also discuss Rule 1.7(b) vis-a-vis Rule 1.8(a) in footnote 3 on page 1196.

FN7. The Colorado Rules of Professional Conduct were revised in 2008. The 2007 version of Colo. RPC 3.3(a) stated:

FN8.

A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client... .

(3) offer evidence the lawyer knows is false.

The revised 2008 version of Colo. RPC 3.3(a) states:

A lawyer shall not knowingly:

advised of the desirability of obtaining independent counsel in writing and, if the client gives written consent, the writing must contain the essential terms of the transaction and the lawyer's role in the transaction.

FN3. In contrast to Rule 1.8(a), Rule 1.7(b) prohibits a lawyer from representing a client if the representation may be materially limited by the lawyer's responsibilities to third parties or by the lawyer's own interests unless, among other things, the lawyer believes the representation will not be adversely affected. In contrast to Rule 1.8(a), the adversity inquiry for Rule 1.7(b) focuses on the effect the adversity will have on the attorney's representation of the client, not merely on the fact that adversity exists. Thus, even though an attorney's own interest in a matter may be adverse to a client's, he does not violate Rule 1.7(b) unless he reasonably believes the adversity will negatively affect his representation of the client.

FN4. In 2008, Rule (j) was amended and now appears as 1.8(i).

FN5. Or, under the 2008 revision, "liens authorized by law."

FN6. In contrast to Rule 1.7(b), Rule 1.8(a) is violated if an attorney and a client's interests are adverse, whether or not that adversity negatively impacts the client. Colo. RPC 1.7(b)'s adversity

> (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer... .
>
> (3) offer evidence the lawyer knows to be false.

FN8. Fisher's attorney's lien was not perfected until May 6, 2004, when he filed the notice of attorney's lien in the El Paso District Court. However, the lien arose when Fisher began representation of Ms. Varner.

FN9. C.R.C.P. 26.2 as it existed in 2003 governs Fisher's conduct before the trial court because the conduct in question occurred in 2003. C.R.C.P. 26.2 was repealed in 2005.

FN10. I disagree with the majority that its possible rationale could support the Board's finding of no violation. It posits that

> [t]he Hearing Board may have found that Fisher's interest would not negatively affect Ms. Varner. In fact, Ms. Varner and Fisher's interests were aligned with regard to the sale of the

residence.

Maj. op. at 1201. Yet the interests of Ms. Varner and Fisher in the sale of the residence were not aligned, Ms. Varner's interest was to obtain the highest possible sale price. Fisher's interest was to obtain a sale price that was high enough so that his deed of trust would be paid off. Indeed, the majority concludes that, under Colo. RPC 1.8(a), the interests were "adverse." Maj. op. at 1196. Thus, under Rule 1.7(b)(1), the only question is whether "the lawyer reasonably believe[d] the representation w[ould] not be adversely affected." Colo. RPC 1.7(b)(1). In my view, it would be difficult to show that one could reasonably believe that conduct categorically prohibited as adverse under 1.8(a) would not adversely affect an attorney's representation under 1.7(b)(1).

I also disagree with the majority's focus on whether Fisher's representation was in fact affected by his interest in the residence. *See* maj. op. at 1201 (concluding that his interest did not negatively affect Ms. Varner). The question is not whether Fisher's interest in the residence did *in fact* adversely impact the representation, but rather whether he reasonably believed, at the time the conflict appeared, that it would not. *See* Colo. RPC 1.7(b)(1) (2007).